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IN THE

Supreme Court of the United States

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, LOUISIANA CHAPTER; ST. JAMES CITIZENS FOR JOBS & THE ENVIRONMENT; CALCASIEU LEAGUE FOR ENVIRONMENTAL ACTION NOW; HOLY CROSS NEIGHBORHOOD ASSOCIATION; FISHERMEN & CONCERNED CITIZENS' ASSOCIATION OF PLAQUEMINES PARISH; ST. THOMAS RESIDENTS COUNCIL; LOUISIANA ENVIRONMENTAL ACTION NETWORK; LOUISIANA ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW; NORTH BATON ROUGE ENVIRONMENTAL ASSOCIATION; LOUISIANA COMMUNITIES UNITED; ROBERT KUEHN; CHRISTOPHER GOBERT; ELIZABETH E. TEEL; JANE JOHNSON; WILLIAM P. QUIGLEY; TULANE ENVIRONMENTAL LAW SOCIETY; TULANE UNIVERSITY GRADUATE AND PROFESSIONAL STUDENT ASSOCIATION; INGA HAAGENSON CAUSEY; CAROLYN DELIZIA and DANA HANAMAN,

Petitioners,

v.

SUPREME COURT OF THE STATE OF LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the First Amendment forbid a state court from promulgating purportedly neutral rules governing student law practice that are openly designed to suppress the presentation of disfavored viewpoints to the judiciary?

2. May a reviewing court consider a state body's motive when determining whether promulgation of purportedly neutral rules openly designed to suppress the presentation of disfavored viewpoints violates the First Amendment?

3. Does the First Amendment forbid a state from barring qualified law students enrolled in faculty-supervised clinics operated by private law schools from appearing in litigation brought by the clinic if any clinic student or supervising faculty member played a role in notifying prospective clients of their legal rights and offering them assistance?

4. Does the First Amendment forbid a state from conditioning authorization to engage in faculty-supervised student law practice on a coerced waiver of the speech rights of student practitioners, faculty supervisors, and potential clients?

5. Does the First Amendment forbid a state from dictating the nature of the clients to whom faculty-supervised law clinics operated by private law schools may offer their services on a pro bono basis?

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Plaintiff-petitioners Southern Christian Leadership Conference, *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the district court, dated July 27, 1999, granting defendant the Louisiana Supreme Court's motion to dismiss the complaint for failure to state a claim is reported at *Southern Christian Leadership Conference v. Supreme Court of the State of Louisiana*, 61 F. Supp. 2d 499 (E.D. La. 1999). The opinion of the United States Court of Appeals for the Fifth Circuit, filed May 29, 2001, affirming the decision of the District Court granting defendant's motion to dismiss is reported at *Southern Christian Leadership Conference v. Supreme Court of the State of Louisiana*, 252 F.3d 781 (5th Cir. 2001). These opinions are reproduced in the Appendix to this Petition for Writ of Certiorari as Appendices A and B.

STATEMENT OF JURISDICTION

The Fifth Circuit entered its judgment on May 29, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The following constitutional provisions, statutes and regulations are involved in this case:

1. United States Constitution, Amendment I; and
2. Rule XX of the Rules of Supreme Court of Louisiana (Apr. 15, 1999) (App. C at 63a-71a).

STATEMENT OF THE CASE

A. Statement of Facts

In 1999, after nearly thirty years of permitting Louisiana law students to represent disadvantaged parties under faculty supervision through law school clinical programs, the Louisiana Supreme Court amended its student practice rules in an open effort to silence vigorous advocacy on behalf of clients whose health and environmental safety are threatened by efforts to locate noxious industrial plants in poor neighborhoods.

In 1971, the Louisiana Supreme Court adopted Rule XX, which authorized law students to represent clients on a pro bono basis under faculty supervision in the context of law school clinics. *See* LA. SUP. CT. R. XX (1971). The Rule had as its stated purposes to "provid[e] assistance to clients unable to pay for such services and to encourage law schools to provide clinical instruction in trial work of varying kinds." *Id.* § 1. In 1988, the Louisiana Supreme Court amended Rule XX to authorize law students to represent community organizations, as well as individuals. *See* LA. SUP. CT. R. XX (1988).

In 1996 and 1997, the Tulane Environmental Law Clinic (TELC) successfully represented a community group and local residents in St. James Parish, Louisiana in opposing a proposal by the Shintech Corporation to construct a chemical plant in their community. The planned facility would have released an additional 1.5 million tons of pollution (some of it carcinogenic) each year into the surrounding air. Compl. ¶¶ 23-27 (App. D at 91a-94a).

TELC's successful representation of these clients in the Shintech matter provoked a barrage of criticism from

powerful political and business figures in Louisiana. These forces launched a concerted campaign to prevent TELC and other law school clinics from continuing to represent disadvantaged communities in Louisiana seeking to raise environmental and health concerns. Compl. ¶ 28 (App. D at 94a). Louisiana Governor Murphy J. "Mike" Foster called the President of Tulane University to complain about TELC, Compl. ¶ 28 (App. D at 94a); urged business leaders to withhold their support for Tulane University until it reined in TELC, Compl. ¶ 29 (App. D at 94a); and suggested that the Louisiana legislature should consider stripping Tulane of its tax-exempt status in retaliation for TELC's activities. Other high state officials joined the attack on TELC, including the Secretary of the Louisiana Department of Economic Development, who vilified TELC and its community group clients as "environmental fascists" who used "brown-shirt tactics." Compl. ¶¶ 35-36 (App. D at 96a-97a).

When these attempts at direct pressure on Tulane failed, the political and business interests turned to the elected Louisiana Supreme Court, launching a heavy-handed political campaign to urge the court to limit student law practice, and specifically demanding that law school clinics be restricted from representing community groups and from engaging in legal outreach of the sort that public interest organizations routinely conduct. Compl. ¶¶ 29-49 (App. D at 94a-104a). Not shy about declaring that their displeasure with TELC and its clients arose from the viewpoints they were voicing, major industry trade associations filed a complaint with the Louisiana Supreme Court charging that TELC's actions hurt Louisiana business and urging the court to investigate the positions advocated by TELC and to restrict its activities. Compl. ¶¶ 31, 33 (App. D at 95a-96a).

The business community exerted pressure on the Louisiana Supreme Court not only from the outside, but from within the

courthouse as well. Supreme Court of Louisiana Deputy Judicial Administrator Kim Sport served as the court's public liaison and was one of its initial investigators of the complaint concerning TELC and its clients. Simultaneously, however, she served as an officer with the New Orleans Chamber of Commerce, one of the major trade associations lobbying the Louisiana Supreme Court to limit the activities of TELC and the other law school clinics. Compl. ¶ 34 (App. D at 96a).

Responding to this mounting political pressure, the Louisiana Supreme Court launched an official investigation into the activities of TELC and Louisiana's other law school clinics. Compl. ¶¶ 41, 43 (App. D at 99a-100a). The court has never made public the results of that investigation. However, two of its members, including the Chief Justice, have disclosed that the investigation revealed no evidence that the student practice rules had been violated; that student practitioners at any Louisiana law school clinic had engaged in unethical or inappropriate conduct; or that any clinic had represented clients capable of affording private legal counsel. Compl. ¶¶ 45, 46 (App. D at 101a-102a).

Despite the results of its own internal investigation, the Louisiana Supreme Court succumbed to the campaign to silence the law school clinics, sharply curtailing their activities in a transparent effort to prevent additional environmental litigation. The March 30, 1999 amendments (denominated as the Rule XX amendments),[1] imposed significant new restrictions on the ability of community groups in Louisiana to obtain assistance from law clinic students — historically one of the few sources of legal aid

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1. The text of the amended Rule XX is set forth as Appendix C at pages 63a-71a.

for community organizations in Louisiana unable to afford private counsel. Compl. ¶ 56 (App. D at 107a).

First, the Rule XX amendments added an "anti-solicitation" provision designed to cut law school clinics off from the poor communities they had served. Notwithstanding this Court's teaching that the First Amendment guarantees freedom to pursue public education about legal rights accompanied by offers of pro bono legal assistance, *see In re Primus*, 436 U.S. 412 (1978), and *NAACP v. Button*, 371 U.S. 415 (1963), the amended rule bars clinical law students from representing clients on any matter that was the subject of community legal education by anyone associated with the clinic — whether licensed clinic lawyers, other clinic staff, or students. *See* LA. SUP. CT. R. XX § 10 (1999) (App. C at 70a). The "anti-solicitation" provision effectively precludes anyone associated with a Louisiana law school clinic from offering community legal education and accompanying pro bono assistance, since the essence of a clinical educational experience is the ability to engage in faculty-supervised practice. Under the anti-solicitation rule, a law clinic may engage in education of the community, or litigation on behalf of the community, but not both.

Second, in an ostensible effort to target law clinic resources toward the poor, the Rule XX amendments added a group client eligibility restriction that prohibits law clinic students from representing a community organization unless at least 51% of the group's members are below a specified income level. *See* LA. SUP. CT. R. XX §§ 4 & 5 (1999) (App. C at 65a).

The use of community organizations as plaintiffs in environmental litigation is particularly important because individual plaintiffs are often vulnerable to economic

retaliation. However, as a practical matter, the new group-eligibility rule requires members of a community group seeking representation by a law clinic to disclose their identities and personal finances in order for the clinic to be confident that the representation is legally permitted. In doing so, the rule effectively destroys the ability of community organizational plaintiffs to shield individuals from potential reprisals. In view of this impact and the significant administrative burdens associated with documenting group eligibility, Louisiana law school clinics have decided they have no option but to stop having students provide representation to community organizations.[2] Thus, although the income eligibility rules ostensibly direct clinic resources toward the poor, they are in fact designed to function as a hurdle cutting poor communities off from legal representation.

B. The Proceedings Below

Plaintiffs, consisting of clients who sought representation by Louisiana law school clinics, law school clinical

2. Many low-income community group members, like people of any income level, are reluctant to disclose their identities and information about their finances, particularly where it might get into the hands of powerful litigation adversaries who could use it to harass or embarrass them. Compl. ¶¶ 57-58 (App. D at 107a-108a). Additionally, complying with the certification requirements imposes severe burdens on community groups, which typically lack the administrative resources to gather and regularly update information on their members' incomes sufficient to document their eligibility for representation. Compl. ¶¶ 64-65 (App. D at 110a-111a). Moreover, in at least one incident, a court has permitted opposing counsel in a law clinic case to pursue intrusive discovery of an individual's finances in an effort to challenge that client's eligibility for law student representation. *Magsino v. Gridiron Constr. Co.*, No. 99-6002 (Parish of Orleans Civil Dist. Ct., Div. "B").

professors, and law students enrolled in law school clinics, filed this lawsuit challenging the constitutionality of the amendments to Rule XX. They alleged that the amendments were an exercise in impermissible viewpoint discrimination because they had the purpose and effect of suppressing the presentation of politically unpopular viewpoints to Louisiana's courts. In addition, plaintiffs argued that the Rule XX amendments violated the First Amendment's unconstitutional conditions doctrine because they conditioned the plaintiffs' participation in the law student practice program on surrendering important First Amendment rights.

On July 27, 1999, the U.S. District Court for the Eastern District of Louisiana granted the Louisiana Supreme Court's motion to dismiss the complaint for failure to state a claim. App. B at 30a. The court did not address plaintiffs' unconstitutional conditions claim, and found irrelevant plaintiffs' allegations that the amendments to Rule XX were improperly motivated by a desire to suppress the disfavored viewpoints espoused by the law students and their clients. Indeed, the district court suggested that it was not only permissible but inevitable for the elected Louisiana Supreme Court to respond to political pressure, commenting that "[i]n Louisiana, where state judges are elected, one cannot claim complete surprise when political pressure somehow manifests itself within the judiciary." App. B at 61a.

The Fifth Circuit affirmed the dismissal. App. A at 1a. Beginning with plaintiffs' unconstitutional conditions challenge to the group eligibility requirement, the court found that it triggered mere rational basis review — a test that the court said the rule readily met.

Addressing next plaintiffs' unconstitutional conditions claim involving the rule's restriction of pro bono solicitation, the court found that, because the solicitation restriction merely "indirectly discourages speech," App. A at 16a, rather than "prohibit[ing] [it] directly," App. A at 21a, and because student practitioners are not licensed members of the bar, the solicitation restriction posed no legally cognizable burden on plaintiffs' First Amendment rights. App. A at 17a-19a.

Turning finally to plaintiffs' viewpoint discrimination claim, the court of appeals acknowledged that "[t]he Plaintiffs have alleged facts that may arguably support their claim that the LSC reacted to pressure from the Governor and business interests who bore [TELC] significant animus." App. A at 26a. But it found that even if the motive behind the amendments was to "defuse political pressure on the [Louisiana Supreme Court], and to diminish the likelihood of the recurrence of similar activities in the future," such motivation would not "transform Rule XX into an unconstitutional state action." App. A at 27a.

The court concluded that the restrictions imposed by the amendments to Rule XX amounted to a refusal to support certain types of speech rather than an effort to stamp it out or suppress it, and that "the new version of Rule XX will not silence any group or individual's speech except to the extent that it ceases to support private speech." App. A at 28a. Although the court acknowledged that the jurisprudence regarding the impact of viewpoint suppressive motivation "is less than clear," App. A at 22a, it ultimately held that any such motive of the Louisiana Supreme Court was irrelevant, and that the plaintiffs had failed to state a claim that the amendments to Rule XX constituted viewpoint discrimination. App. A at 28a-29a.

REASONS FOR GRANTING THE PETITION

I. The Core of the First Amendment is an Absolute Ban on Governmental Viewpoint Discrimination. As the Restrictive Rules at Issue Here Were Motivated By a Desire to Silence a Particular Viewpoint, the Court Should Clarify the Circumstances Under Which Courts Must Consider Viewpoint Suppressive Motive in Determining Whether a Purportedly Neutral Rule Violates the First Amendment.

The core of First Amendment protection is a ban on viewpoint discriminatory censorship by the government. When evidence of viewpoint discrimination appears on the face of a government enactment, this Court has been merciless in its condemnation. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992). Where, however, government viewpoint discrimination is codified in a purportedly neutral restriction, this Court has given conflicting signals about the duty of the lower courts to consider such motive when enforcing the First Amendment. Not surprisingly, the Fifth Circuit candidly acknowledged confusion about the relevance of the Louisiana Supreme Court's alleged viewpoint-suppressive motive in amending the law student practice rules. In something of an understatement, the court observed that "the jurisprudence in this area is less than clear." App. A at 22a.

This Court has embraced motive inquiry in some First Amendment cases involving facially neutral laws or pronouncements, and eschewed it in others, without articulating a clear rule as to when it is appropriate for a court to look behind the purportedly neutral words of a rule or law regulating speech in order to take cognizance of the censor's viewpoint discriminatory motive. This inconsistency

has left the lower courts without guidance, resulting in differing approaches to the treatment of motive, subjecting litigants to the risk of inconsistent outcomes, and inviting cynical regulations that masquerade as neutral measures, but which are nothing more than sophisticated exercises in viewpoint discrimination. This case provides an ideal vehicle through which the Court can announce a consistent approach to First Amendment motive inquiry, providing much needed guidance to lower courts, litigants, and rule-making bodies alike.

A. This Court Has Not Articulated A Standard for When Motive Inquiry is Appropriate in Assessing the Constitutionality of a Purportedly Neutral Rule Limiting First Amendment Activity.

Concern about improper government motive drives most First Amendment jurisprudence. From the void-for-vagueness doctrine to the least-restrictive-means test to the refusal to allow viewpoint-based judgments to the ban on standardless permits to strict enforcement of First Amendment equality rules, First Amendment doctrine is designed to minimize the opportunity for government officials to suppress disfavored speech. Because policing improper governmental motive is so central to ensuring First Amendment freedoms, it is critical that the Court provide clear guidance as to the role of motive — and, in particular, motive to suppress disfavored viewpoints — in First Amendment review of purportedly neutral rules.

Regrettably, the Court's precedents in this critical area are confusing. On one side of the spectrum lie a series of cases in which the Court has allowed parties to pierce the purportedly neutral language of a government regulation for proof of discriminatory motive, as well as cases where the

Court itself has actually invalidated a facially neutral legislative enactment because of impermissible motive.

For example, in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985), the Court assessed an Executive Order and implementing agency regulation governing access to a federal workplace charity drive. A virtually unlimited array of charitable causes were permitted to participate, but not groups that sought to influence "the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves." *Id.* at 795. The restriction was viewpoint neutral on its face, and the Court found the government's justification reasonable. But that did not end the inquiry. Rather, the Court concluded that no justification will "save a regulation that is in reality a facade for viewpoint based discrimination." *Id.* at 811. Put another way, a potentially valid justification "cannot save an exclusion that is in fact based on the desire to suppress a particular point of view." *Id.* at 812 (citing *Village of Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980)). In light of evidence in the record that "cast doubt upon [the] genuineness" of the asserted grounds for excluding certain types of organizations, the Court authorized those groups to pursue, on remand, their contention that in excluding them, the rule's authors were "impermissibly motivated by a desire to suppress" their point of view. *Id.* at 812-13.

Motive was also a central factor in *Board of Education v. Pico*, 457 U.S. 853 (1982). There the Court considered a challenge to a school board's decision to remove certain books from a school library. Focusing entirely on the motivation for that decision, this Court held that if the school board members "*intended* by their removal decision to deny

[students] access to ideas with which [the board] disagreed, and if this intent was the decisive factor in [the board's] decision, the [board members] have exercised their discretion in violation of the Constitution." *Id.* at 871 (emphasis in original). Explaining that the removal decision would be perfectly constitutional if based on the vulgarity of the books or their educational suitability, *id.*, the Court sent the case back to the trial court to consider the board's motivation.

The Court has actually gone on to invalidate legislative acts under the First Amendment where they were driven by improper viewpoint-based motivation. For example, the Court held that a Louisiana tax on the gross advertising receipts of larger newspapers was "bad because, in light of its history and the present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information." *See Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 250 (1936). As the Court later explained, the "history" and "present setting" to which the Court referred was the politically charged climate of tension between then Senator Huey Long and the Louisiana press. Long and the Governor of Louisiana had distributed a circular referring to "lying newspapers," and the tax in question as a "tax on lying." *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 579-80 (1983) (discussing *Grosjean*). In a bow to the propriety of inquiring into a legislature's motive, the Court in *Minnesota Star* observed that "the motivation of the legislature may have been significant" in the decision to strike the Louisiana tax in *Grosjean*. *Id.*

Conversely, the Court has also found decisive the absence of evidence that a challenged action was improperly motivated. For example, in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983),

the Court held that restrictions imposed on a union's access to a school's internal mail system did not amount to viewpoint discrimination. The holding hinged in part on the absence of evidence "that the school board intended to discourage one viewpoint and advance another." *Id.* at 49.

Moreover, the Court has routinely inquired into improper motivation in First Amendment contexts other than free speech. For example, it relied on the "legislature's preeminent religious purpose" in holding that a state law requiring that creationism be taught whenever evolution was covered violated the Establishment Clause. *See Edwards v. Aguillard*, 482 U.S. 578, 590 (1987). *See also Epperson v. Arkansas*, 393 U.S. 97 (1968). More recently, the Court held that it was appropriate and, indeed, necessary to inquire into the circumstances surrounding enactment of a school policy permitting student-led invocations before football games to determine if it violated the Establishment Clause. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000). *See also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540-41 (1993) (Kennedy, J., concurring) (in First Amendment Free Exercise challenge to municipal ordinance, "[r]elevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history . . .").

Although the Court's First Amendment decisions are replete with instances where improper motive was not only considered by the Court but determinative of the outcome, there are, on the other side of the spectrum, cases in which the Court has declined to inquire into motive, sometimes expressing a broad disinclination to do so. Perhaps the strongest statement of that position is found in *United States*

v. O'Brien, 391 U.S. 367 (1968), in which the Court referred to the "familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.* at 383 (*citing McCray v. United States*, 195 U.S. 27, 56 (1904), and *State of Arizona v. State of California*, 283 U.S. 423, 455 (1931)). That view has been echoed more recently in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 292 (2000). The Court has explained that "[i]nquiries into congressional motives or purposes are a hazardous matter." *O'Brien*, 391 U.S. at 383. Among the reasons offered for refraining from such inquiry are the difficulty in ascertaining the dominant motive of a large group of legislators and the futility of invalidating a law because of bad motive, when it could simply be reenacted for proper reasons. *See Palmer v. Thompson*, 403 U.S. 217, 225 (1971).

The Court has thus reached different conclusions about the role of motive in its analysis of First Amendment claims depending on the particular circumstances presented. Although some patterns emerge from these cases — for example the Court is more inclined to consider motive when there is evidence of pretext or a sham rationale, and reluctant in some instances where the body whose motive is questioned is a large legislative one — the lack of guidance from the Court on this question has generated confusion in the lower courts, and has resulted in inconsistent treatment of motive in free speech cases.[3] Guidance from this Court is thus needed

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3. *See, e.g., Grossbaum v. Indianapolis-Marion County Bldg. Authority*, 100 F.3d 1287, 1290 (7th Cir. 1996) (concluding that "motive of a government body is irrelevant when it enacts a content-neutral rule that regulates speech in a nonpublic forum"), *cert. denied*, 520 U.S. 1230 (1997); *South Carolina Educ. Ass'n v.* (Cont'd)

in order to provide fair notice to all involved and ensure uniform standards.

B. The Fifth Circuit Erred in Finding that the Louisiana Supreme Court's Motive to Suppress Disfavored Speech was Irrelevant to Plaintiffs' Viewpoint Discrimination Claim.

Led astray by the lack of reliable guidance in this area, the Fifth Circuit dismissed as legally irrelevant the evidence strongly suggesting that the Louisiana student practice rule changes were driven by a desire to discourage disfavored speech. While the lower court's candid confusion was understandable to a degree, the weight of this Court's recent authority suggests that the unusually stark evidence of viewpoint suppressive motive in this case should not have been ignored.

The complaint, which must be taken as true in this context, contains detailed allegations that the Louisiana Supreme Court issued the amendments to Rule XX in order to silence student law clinic programs, as a direct result of political pressure from the Governor and powerful business

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(Cont'd)
Campbell, 883 F.2d 1251, 1259 (4th Cir. 1989) (allowing motive inquiry only in case of laws that "on their face *directly* inhibit or have the inevitable effect of inhibiting freedom of speech or related constitutional rights") (emphasis in original), *cert. denied*, 493 U.S. 1077 (1990); *Tovar v. Billmeyer*, 721 F.2d 1260, 1264-65 (9th Cir. 1983) (assuming without discussion that inquiry into motive of city legislators would be proper in case challenging zoning ordinance); *Families Achieving Indep. & Respect v. Nebraska Dep't of Social Servs.*, 111 F.3d 1408, 1422-23 (8th Cir. 1997) (en banc) (examining motive behind government policy but ultimately concluding that rule's adoption was not intended to suppress disfavored viewpoints).

organizations infuriated by the "anti-business" viewpoint expressed by the clinics and some of their clients. The district court recognized the "close temporal proximity between the business community's expressions of outrage and the subsequent changes" to Rule XX. App. B at 60a. In view of these facts, the court of appeals acknowledged that "[t]he Plaintiffs have alleged facts that may arguably support their claim that the LSC reacted to pressure from the Governor and business interests who bore [the Tulane Environmental Law Clinic] significant animus." App. A at 26a.

But neither court found the allegations of suppressive motivation legally relevant to the claims of viewpoint discrimination. Indeed, the district court went so far as to suggest that political pressure of the sort alleged in the complaint is to be expected, commenting that "in Louisiana, where state judges are elected, one cannot claim complete surprise when political pressure somehow manifests itself within the judiciary." App. B at 61a.

Contrary to the district court's jaded appraisal, it is precisely when such political pressure results in suppression of a disfavored viewpoint that the protections afforded by the First Amendment come into play. This Court has been unwavering in its opposition to viewpoint-based discrimination, characterizing it as an "egregious form" of First Amendment violation. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). *See also Perry*, 460 U.S. at 46; *Cornelius*, 473 U.S. at 811. By refusing to consider the Louisiana Supreme Court's suppressive motive in amending the student practice rules, the courts below have condoned exactly the kind of viewpoint discrimination this Court has always condemned.

Plaintiffs do not argue, as the Fifth Circuit suggests, that an illicit motive "can turn *any* state action into an unconstitutional suppression of speech." App. A at 25a (emphasis in original). Their contention is not that impure motive standing alone is actionable, but rather that illicit motive can provide salient evidence of unconstitutional viewpoint suppression. If permitted to prove their case, plaintiffs would show that the amendments to Rule XX, in purpose and effect, restrict the expression of their viewpoint, while presenting no impediment to the viewpoint espoused by the government and business interests who have so doggedly sought to silence them.

Thus, this matter fits neatly into the line of cases in which the Court appears to be most willing to pierce a facially neutral rule: when there is evidence suggesting that a proffered, apparently neutral justification serves as a pretext for an unconstitutional purpose. In *Edwards v. Aguillard*, the Court observed that "[w]hile the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." 482 U.S. at 586-87. Similarly, the Court's authorization for an inquiry into motive in *Cornelius* was triggered by evidence that "cast doubt upon [the] genuineness" of the government's purported justification for its regulations excluding certain types of charities from the Combined Federal Campaign. 473 U.S. at 812. Concurring in *Wallace v. Jaffree*, Justice O'Connor has suggested that inquiry into motive is appropriate when there is objective evidence of improper intent. *See* 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

Here, as the two lower courts grudgingly acknowledged, there is abundant evidence alleged in the complaint that the asserted rationale for amending the student practice rules

was a pretext for suppressing the views expressed by the clinics and their clients.[4] Indeed, dissenting from the amendment to the student practice rules, one of the members of the Louisiana Supreme Court, Justice Bernette Johnson, confirmed that her colleagues had been pressured to rein in the clinics because of complaints that "business in the state was being negatively impacted by [the clinics'] misguided challenges to environmental permits and other practices." Resolution of the La. Supreme Ct. Adopting Amendments to La. Supreme Ct. R. XX (Mar. 30, 1999) (Johnson, J., dissenting). This frank acknowledgment of viewpoint suppressive motive, combined with the related extensive circumstantial evidence (including the blatant conflict of interest of the Louisiana Supreme Court's lead staffer, Kim Sport) and the lack of evidence of any improper conduct by law clinic students or staff, are the sort of evidence of improper government action that the Court in *Cornelius* and *Edwards v. Aguillard* found violated the First Amendment. This Court has never asked federal courts to look away when confronted by evidence of viewpoint suppressive motive. The Fifth Circuit accordingly erred in holding that the Louisiana Supreme Court's motive was irrelevant.

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4. For example, after construction of the controversial Shintech plant was blocked by community groups represented by TELC, Louisiana Governor Murphy J. "Mike" Foster and various business groups launched a concerted and highly visible campaign to prevent future clinical representation of community organizations raising health and environmental claims. Governor Foster complained directly to the President of Tulane University and, when that failed, enlisted various business groups to lobby the Louisiana Supreme Court. They sought to bar clinics from representing community groups in opposing development plans favored by the Governor and industry, and to restrict their freedom to solicit clients. Compl. ¶¶ 28-31, 33, 37, 39-40, 47, 49 (App. D at 94a-99a, 102a-104a).

II. The Court Should Clarify How the First Amendment Unconstitutional Conditions Doctrine Applies to Efforts to Restrict Student Practice in Faculty-Supervised Clinics Operated and Maintained by Private Law Schools. Participants in Law School Clinics May Not Be Compelled to Sacrifice Fundamental Free Speech Rights in Order to Represent Clients Under Appropriate Faculty Supervision.

It has become a truism that existing precedents concerning application of the First Amendment unconstitutional conditions doctrine do not yield clear-cut guidance.[5] In recent years, frequent disagreements have arisen in the context of important private institutions dependent for their operation on government financial support. At issue has been the breadth of the government's power to limit the speech-related activities pursued in private programs operating with government funds. This Court has grappled with this question in a series of cases and contexts including *Rust v. Sullivan*, 500 U.S. 173 (1991) (subsidized family planning programs); *Rosenberger*, 515 U.S. 819 (subsidized student press at public university); *Finley v. National Endowment for the Arts*, 524 U.S. 569 (1998) (subsidized arts programs); and *Legal Services Corporation v. Velazquez*, 121 S. Ct. 1043 (2001) (subsidized legal services for the poor). In this

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5. *See, e.g.*, William Glaberson, *Hazy Legal Terrain: Museum Fight Pits Free Expression Against Control of Public Spending*, N.Y. TIMES, Sept. 30, 1999, at B12 ("The Supreme Court has ducked a straight-on resolution in every case involving funding.") (quoting Harvard Law School Professor Richard H. Fallon, Jr.); *id.* ("This is a black hole of First Amendment law. No one really knows how to think about it, including the Supreme Court Justices.") (quoting University of Chicago Law School Professor David A. Strauss).

emerging case law, the Court has endeavored to balance grant recipients' First Amendment rights against the government's prerogative to choose what goals and messages to promote using the limited public funds at its disposal. *See Velazquez*, 121 S. Ct. at 1048-49.

This case poses a related but largely unaddressed question: what are the contours of the First Amendment unconstitutional conditions doctrine when it is a non-economic government permission — not a grant of funds — that is at issue? The Fifth Circuit assumed that the same unconstitutional conditions principles that apply to government grants apply to non-economic government decisions to permit certain activity:

> Although the [Louisiana Supreme C]ourt is not funding the clinics, the LSC is supporting those clinics by its allowance of unlicensed students' representation in the role of attorneys of clinic clients — an allowance that the Court was under no obligation whatsoever to grant.

App. A at 26a. Relying on *Velazquez* and *Rust* — two of the Court's leading government funding cases — the Fifth Circuit concluded that "[T]he LSC must be able to define the scope of the law practice that unlicensed students undertake as part of the clinical programs." App. A at 26a.

But it is by no means obvious that government "must be able to define the scope" of the substantive activities carried out by private law school clinics. It is true that "When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Rosenberger*, 515 U.S. at 833,

quoted in Velazquez, 121 S. Ct. at 1048. Moreover, even when a grant is not meant to convey a government message, but rather to subsidize the delivery of a service — for example, legal services for the poor — the government is still permitted to define (in viewpoint-neutral fashion) the categories of services for which it is willing to pay. *See Velazquez*, 121 S. Ct. at 1052.

The rationale for permitting such government control is that the state is disbursing scarce public dollars and so must be permitted to prioritize how they are spent. The same dynamics and concerns do not obtain, however, where the government exercises its regulatory power to permit law students to represent clients under close faculty supervision. The crucial difference is that regulating private law school clinics neither involves allocation of a limited resource (like tax dollars) nor implicates questions of the government "speaking." Because the law school clinic will not be understood as speaking for the government, and because the clinic does not cost the government anything, the justifications that permit some content regulation of government-funded private programs are absent in the context of privately funded law school clinics.

The fact that the Court's First Amendment funding case law does not readily translate to law school clinics is not to say that the Court has offered no guidance in this area. The chief basis on which the government has historically regulated the practice of law has been compliance with professional standards of accreditation and ethics. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982). Where, however, government rules have attempted to condition permission to practice law or to pursue other professions in ways that burden First Amendment rights, the Court has responded skeptically and applied heightened

scrutiny. Thus, the Court has held that rules requiring bar applicants, *see In re Stolar*, 401 U.S. 23 (1971), or teacher candidates, *see Shelton v. Tucker*, 364 U.S. 479 (1960), to reveal the names of any organizations to which they may belong as a condition of licensing violate the First Amendment.

But this limited case law notwithstanding, the Court has offered scant guidance on the core question of when and how student practitioners operating under faculty supervision can be forced to surrender First Amendment rights as the price of being permitted to participate in a law school clinic. For example, why should student practitioners be precluded from appearing in any case that results from clinic efforts to provide public legal education and accompanying offers of pro bono assistance to disadvantaged communities? Similarly, as to the new group eligibility restriction, although it is praiseworthy on one level, why does the Louisiana Supreme Court's claimed purpose of reserving privately financed law clinic representation exclusively for low-income groups and individuals qualify as a valid government interest?

To be sure, low-income communities in Louisiana and across the nation have great unmet legal needs. And if the State of Louisiana were to extend grants to private universities or organizations to subsidize the delivery of legal services to those unable to afford them — something which, ironically, it does not do — the state would be free and, in fact, encouraged to target those services based on need to the state's low-income residents. But when the government is not funding an activity, but simply permitting private universities and students to volunteer their assistance, what business is it of the state to dictate whom they may help and how — as long as the traditional regulatory criteria of competence and ethics are satisfied?

Occasionally states have attempted to wield their authority to license the practice of law so as to restrict private groups offering pro bono legal services to serving only categories of clients deemed by the government sufficiently needy or worthy. When challenged, state courts have followed this Court's associational rights precedents and concluded that such conditions impermissibly burden the First Amendment freedoms of pro bono legal services providers to choose the clients they will serve. *See In re New Hampshire Disabilities Rights Ctr., Inc.*, 541 A.2d 208, 215 (N.H. 1988) (Souter, J.) (state may not condition authorization of not-for-profit corporation to practice law — an exception to the general bar against practice of law by corporations — on requirement that it restrict itself to serving only low-income clients). As Justice Souter explained, writing for the New Hampshire Supreme Court, "[the] members and employees [of a non-profit public interest law organization] have an associational right under the first amendment to engage in advocacy on behalf of [their target client community] . . . whether or not the clients are poor . . . ." *Id.* at 215 (citing and discussing *Button* and related cases). *Accord Application of Thom for Approval of Incorporation of Lambda Legal Defense & Educ. Fund, Inc.*, 301 N.E.2d 542, 544-45 (N.Y. 1973) (Burke, J., concurring) (application of public interest legal organization for non-profit corporate charter cannot be denied on grounds that organization does not limit its services to indigents).

Of course, many private providers of pro bono legal services — including private universities that elect to establish law school clinics — will choose to direct their services toward low-income clients, believing that their needs are greatest. But there is a world of difference between private entities *choosing* how to direct the services that they

volunteer, and the government leveraging its licensing power into the power to dictate what clients private entities, operating entirely with private funds, may volunteer to help. Why does the state's "greater power" to refuse to authorize law student practice embrace the "lesser power" of authorizing it but subject to limitations about to whom such services may be offered? To take an unusual but not entirely hypothetical case, if private groups and law students seek to establish a law school clinic to teach commercial litigation skills or defend principles of free enterprise by serving the legal needs of business, why does the First Amendment allow the government to refuse permission on the ground that it would prefer that they volunteer their services to different categories of clients?[6]

III. The Court Should Clarify Whether Rules That Significantly Burden Efforts by Participants in Law School Clinics to Inform Persons of Their Legal Rights Are Subject to Exacting First Amendment Scrutiny.

It goes without saying that if the Louisiana Supreme Court had directly prohibited clinical law professors from approaching persons to inform them of their rights and offer them representation, it would have violated clear Supreme Court precedent. *See Button*, 371 U.S. 415; *Primus*, 436 U.S. 412. The question before this Court is whether the same conclusion follows where Louisiana's high court instead placed a dramatic burden on clinical law professors' right to engage in such community education — a burden that forces

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6. In fact, the George Mason University School of Law in conjunction with the conservative Washington Legal Foundation currently operates just such an "Economic Freedom Law Clinic." *See* <<http://www.wlf.org/Litigating/econfreedom.asp >>.

a clinical law professor to choose between exercising her constitutional right to inform the community of its legal rights, and fulfilling her educational obligation to develop cases suitable for student participation.

In *Button* and *Primus*, the Court identified two important components of the First Amendment "right 'to engage in association for the advancement of beliefs and ideas.' " *Button*, 371 U.S. at 430 (quoting *NAACP v. State of Alabama, ex rel. Patterson*, 357 U.S. 449, 460 (1958)). The first is the freedom to engage in public interest reform litigation where pursued "for the advancement of ideas and beliefs [rather than lawyers'] own commercial interests." *Primus*, 436 U.S. at 438 n.32. The second, a significant adjunct to the first, is the right to engage in pro bono solicitation of clients. *See id.* at 431-32; *Button*, 371 U.S. at 437. *See also Bates v. State Bar of Ariz.*, 433 U.S. 350, 377 n.32 (1977) ("Underlying [*Button* and its progeny] was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them.").

Typically, such solicitation entails outreach by lawyers to members of communities adversely affected by a particular practice or problem to inform residents about their rights and offer pro bono legal assistance. As the Court has explained,

> [T]he efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe the facts. The First and Fourteenth Amendments require a measure of protection for advocating lawful

> means of vindicating legal rights, including advising another that his legal rights have been infringed and referring him to a particular attorney or group of attorneys . . . for assistance.

Primus, 436 U.S. at 431-32 (citations, internal quotation marks & editing omitted). In light of this important role of pro bono solicitation, the Court has held that government restrictions on public interest solicitation "must withstand the 'exacting scrutiny applicable to limitations on core First Amendment rights . . . .' " *Id.* at 432 (quoting *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976)).

While recognizing this body of authority, the Fifth Circuit found that it was not controlling because the restrictions at issue in *Button* and *Primus* involved more direct government prohibitions of solicitation. App. A at 16a ("At most, Rule XX indirectly discourages speech"). The panel concluded that, instead, the restriction was subject merely to rational basis review. App. A at 18a.[7]

However, contrary to the court's suggestion, the real world impact of the ban on "solicitation" imposed by Rule XX is dramatic. It functionally prevents teacher and student

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7. Despite the lower court's conclusory treatment of this issue, there is a very substantial question whether the restriction, in fact, survives even rational basis review. Rationality review requires that any government classification be "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). The Fifth Circuit found that Rule XX "is rationally related to the LSC's goal of discouraging solicitation generally." App. A at 19a. But *Button* and *Primus* cast serious doubt on whether, as a matter of law, discouraging pro bono solicitation can ever constitute a "legitimate state interest."

from engaging in both community education and clinical representation. Clinical professors are forbidden from educating members of the community about their legal rights and then representing them through the clinic, if clinic students are to be able to appear as practitioners in the resulting case. Indeed, as to a faculty member, violation of Rule XX's ban on solicitation in a case in which students participate as practitioners appears to be punishable as a violation of state bar disciplinary rules, thus rendering Rule XX indistinguishable from the rule in *Primus*.[8] Moreover, as applied to law students, the restriction is equally dramatic. The purpose of a law school clinic is to permit a qualified law student, operating under close faculty supervision, to experience the responsibility and challenge of representing a client in the American legal system. The aim of the clinical experience is a greater understanding of what it means to be an American lawyer. Rule XX denies that experience to any student who engages in educational efforts in the community. By preventing law students from acting in a representative capacity in cases where pro bono community education and solicitation has taken place, the Rule effectively forces both faculty and student to choose between educating the community and representing it.

The Fifth Circuit sought to minimize the impact of this restriction, theorizing that while the Rule discourages legal outreach, it does not technically foreclose a clinic from taking

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8. A licensed clinic professor who exercises her right to solicit and then has a student enter an appearance in the resulting case would appear to violate LA. R. OF PROF. COND. 5.5(b), which forbids a lawyer from "[a]ssist[ing] a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." Violations of state rules of professional conduct are grounds for lawyer discipline. LA. SUP. CT. R. XIX § 9(a).

on cases in which the students cannot practice. App. A at 20a. But such an effort to minimize the impact of Rule XX ignores the very purpose of student law school clinics, which exist in order to train student lawyers and which depend on students' acting in that capacity in order to permit them to experience the demands of actual law practice. Thus, not only is the anti-solicitation regulation a clear violation of traditional First Amendment doctrine, it is also an impermissible interference with the academic freedom of legal educators to shape the experience of student participants in a law school clinic. No basis whatsoever exists for a state-imposed rule that forces students in a law school clinic to forgo learning about representation of clients as the price of learning about community legal education. An excellent law school clinic teaches students to explain legal rights, as well as to enforce them. Accordingly, on both traditional free speech and academic freedom grounds, the anti-solicitation rules are clearly unconstitutional.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED MAY 29, 2001

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 99-30895

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, LOUISIANA CHAPTER; ST. JAMES CITIZENS FOR JOBS & THE ENVIRONMENT; CALCASIEU LEAGUE FOR ENVIRONMENTAL ACTION NOW; HOLY CROSS NEIGHBORHOOD ASSOCIATION; FISHERMEN & CONCERNED CITIZENS' ASSOCIATION OF PLAQUEMINES PARISH; ST. THOMAS RESIDENTS COUNCIL; LOUISIANA ENVIRONMENTAL ACTION NETWORK; LOUISIANA ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW; NORTH BATON ROUGE ENVIRONMENTAL ASSOCIATION; LOUISIANA COMMUNITIES UNITED; ROBERT KUEHN; CHRISTOPHER GOBERT; ELIZABETH E. TEEL; JANE JOHNSON; WILLIAM P. QUIGLEY; TULANE ENVIRONMENTAL LAW SOCIETY; TULANE UNIVERSITY GRADUATE AND PROFESSIONAL STUDENT ASSOCIATION; INGA HAAGENSON CAUSEY; CAROLYN DELIZIA; DANA HANAMAN,

Plaintiffs-Appellants,

v.

SUPREME COURT OF THE STATE OF LOUISIANA,

Defendant-Appellee.

Appendix A

May 29, 2001

* * *

Appeal from the United States District Court
for the Eastern District of Louisiana

Before GOODWIN,* GARWOOD and JONES, Circuit Judges.

GARWOOD, Circuit Judge:

On April 16, 1999, the Plaintiffs[1] filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Louisiana, alleging that Louisiana Supreme Court Rule XX impermissibly suppresses Plaintiffs' freedoms of speech and association as protected under the First and Fourteenth Amendments. The complaint seeks injunctive and declaratory relief, costs and attorneys' fees. Defendant, the Louisiana Supreme Court (LSC),[2] filed two

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* Circuit Judge of the Ninth Circuit, sitting by designation.

1. The plaintiffs in this case are composed of four general groups: law professors, law students, community organizations, and student organizations. For simplicity we will refer to all plaintiffs collectively as "Plaintiffs."

2. Although it is well established that the Eleventh Amendment protects state supreme courts, *see Landers Seed Co., Inc. v. Champaign National Bank,* 15 F.3d 729 (7th Cir.1994), the only defendant in this case is "the Supreme Court of the State of Louisiana." But, the LSC has refrained from advancing any argument that the Eleventh Amendment bars suit at this stage of the case, even after inquiry at oral argument.

motions, asking the district court to dismiss the action under Fed.R.Civ.P. 12(b)(6) for failure to state a claim, and, in the alternative, to dismiss for lack of standing. Oral argument was held on July 21, 1999, and on July 27, 1999, the district court granted the LSC's motions. This appeal by Plaintiffs followed. We affirm.

Facts and Proceedings Below

In 1971, the LSC adopted the precursor to what is now Rule XX, which for the first time allowed the limited practice of law by students as part of supervised clinical education programs in Louisiana law schools. The rule allowed eligible law students in certain circumstances to appear in court or before administrative tribunals in a representative capacity on behalf of the state, its subdivisions, or any indigent person. In 1988, the LSC amended Rule XX to clarify that the rule also allowed students to represent indigent community organizations. *See* Louisiana Supreme Court Rule XX (1988). It is the LSC's most recent set of amendments to Rule XX that prompted the current suit. The rule as it exists now, and as it has always existed, operates only to set forth the limited circumstances under which unlicensed law students may engage in the practice of law in Louisiana; it has no other reach.

Over the years, several Louisiana law school clinics, including the Tulane Environmental Law Clinic (TELC), have supplied legal advice and representation to numerous individuals and various community organizations. In 1996, TELC agreed to represent St. James Citizens for Jobs and the Environment (St. James Citizens), a group of

approximately one hundred low-income and working-class residents of St. James Parish. St. James Citizens was formed in response to a proposal by Shintech, a chemical manufacturer, to build a chemical plant in Convent, a small town in St. James Parish. The group was dedicated to resisting the construction of the Shintech plant in their community and to raising public awareness of community environmental and health concerns related to the proposed plant. TELC represented St. James Citizens in a variety of ways: at hearings before the Louisiana Department of Environmental Quality, in state court, and by filing objections to the proposed plant with the EPA. Eventually the resistance of the local community to the new plant drove Shintech to reject Convent as its site, and the plant was located elsewhere in Louisiana.

According to the Plaintiffs' complaint,[3] TELC's representation of St. James Citizens induced significant criticism of the clinic from political and business leaders in Louisiana. The complaint alleges that various Louisiana business and political leaders, including Governor Foster, tried to convince Tulane University to curtail the endeavors of TELC. Tulane University proved unresponsive to this pressure, and so, according to the complaint, the "powerful political and business interests" opposed to the clinic turned their attention to the LSC. The complaint alleges that these political and business interests urged the LSC to prevent TELC and other clinics from continuing to aid community

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3. For the purposes of a motion to dismiss for failure to state a claim, we assume that all of the allegations in the complaint are true. *Brown v. Nationsbank Corp.*, 188 F.3d 579, 585-86 (5th Cir.1999).

groups in giving voice to environmental and health concerns. The Plaintiffs allege several specific incidents that they claim document the political pressure exerted on both Tulane and the LSC, including phone calls from Governor Foster to the President of Tulane University, statements of Governor Foster at a meeting of the New Orleans Business Council requesting assistance in curtailing the efforts of TELC, various public criticisms of TELC by Governor Foster, a letter from a chamber of commerce organization urging the LSC to eliminate the TELC because the faculty and students involved were "in direct conflict with business positions," and letters from various business organizations, including the Business Council, the Louisiana Association of Business and Industry, and The Chamber/Southwest Louisiana, urging the LSC to eliminate TELC.

Allegedly in response to the concerns of the Governor and business groups, in the fall of 1997 the LSC launched an official investigation into the activities of TELC and Louisiana's other law school clinics. The results of this investigation have not been made public, but the Plaintiffs allege in their complaint that two Justices of the LSC have disclosed that the investigation did not reveal any inappropriate or unethical behavior by any person associated with any Louisiana law school clinic.

The LSC did in fact alter its rule concerning student practitioners, and on March 22, 1999, the Court announced the amendments that established the current form of Louisiana Supreme Court Rule XX. The amendments became effective April 15, 1999, and by their terms "shall not impact or apply to any cases, and/or the representation of any clients,

in which the representation commenced prior to the effective date of the amendments." The amendments to Rule XX altered the existing rule in two ways that are relevant to the present case. First, the rule's indigence requirements were tightened. The new rule allows representation of individuals or families only if their annual income does not exceed 200% of the federal poverty guidelines. The rule also now requires that any indigent community organization that wishes to obtain representation from a clinic must certify in writing its inability to pay for legal services, and at least fifty-one percent of the members of the organization must meet the income guidelines. The second major change to Rule XX involves the community outreach efforts of the law school clinics. Under the new rule, clinical student practitioners are prohibited from representing in the role of attorneys an otherwise qualified individual or organization if any person associated with the clinic initiated contact with that individual or organization for purposes of that representation.[4]

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4. Louisiana Supreme Court Rule XX section 10 now reads: ". . . no student practioner shall appear in a representative capacity pursuant to this rule if any clinical program supervising lawyer, staffperson, or student practitioner initiated in-person contact, or contact by mail, telephone or other communications medium, with an indigent person or indigent community organization for the purpose of representing the contacted person or organization."

The Commentary to section 10 reads, in relevant part, ". . . in furtherance of the Court's policy against solicitation of legal clients generally, the ethical prohibitions against attorney solicitation, and the Court's view that law students should not be encouraged to engage in the solicitation of cases, Section 10, as amended, prohibits a student practitioner from representing a client who has been the

(Cont'd)

Appendix A

In response to the LSC's new Rule XX, the Plaintiffs filed this lawsuit on April 16, 1999.

In an opinion dated July 27, 1999, the district court dismissed the case for lack of standing and for failure to state a claim. The district court held that the complaint failed to establish the deprivation of any cognizable federal right. The court found that the indigence requirements did not implicate any freedom of association or speech, and that the limitation of clinical services to the poor was rationally related to a legitimate government purpose. *Southern Christian Leadership Conference v. Supreme Court,* 61 F.Supp.2d 499, 511 (E.D.La.1999). The court noted that the LSC has broad power to regulate student practice, and held that in this context, the solicitation restrictions of Rule XX did not violate the First Amendment. The court reasoned: "While free speech rights do exist in this area, they are precariously perched when balanced against the imperatives

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(Cont'd)
subject of *targeted* solicitation by any law clinic representative." (emphasis added).

At oral argument, the Plaintiffs asserted that the current version of the rule prevents clinics from engaging in any kind of advertising or outreach. Our interpretation of this rule, however, is that the clinics must refrain from all targeted solicitation, and that initiating in-person or any other kind of direct contact with a potential client prohibits student representation in any matter related to the initiated contact. While the rule certainly discourages solicitous phone calls, letters, and in-person offers of legal services, our reading of the rule would not, for instance, prevent a clinic from merely distributing a generalized leaflet or flyer indicating that the clinic's legal services are available for those who meet the income requirements.

of protecting the public and monitoring professional ethics. Particularly where student solicitation of potential clients is involved, concern for protecting the public grows considerably." *Id.* at 512. Applying rational basis review, the court held that the solicitation restrictions were justified because the restrictions were rationally related to the state's legitimate interest in protecting the public and monitoring professional ethics. *Id.* The court also dismissed the Plaintiffs' claims of viewpoint discrimination, holding that the political motivations of the LSC could not transform an otherwise permissible action into a constitutional violation. *Id.* at 513. Accordingly, the district court dismissed the Plaintiffs' claims in their entirety. This appeal followed.

Discussion

We review *de novo* a district court's dismissal for failure to state a claim under Rule 12(b)(6). *Leffall v. Dallas Independent School Dist.*, 28 F.3d 521, 524 (5th Cir.1994). In considering a motion to dismiss, the complaint should be construed in favor of the plaintiff, and all facts pleaded should be taken as true. *Brown v. Nationsbank Corp.*, 188 F.3d 579, 585-86 (5th Cir.1999). Motions "to dismiss for failure to state a claim [are] 'viewed with disfavor, and [are] rarely granted.' " *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir.1988) (quoting *Sosa v. Coleman*, 646 F.2d 991, 993 (5th Cir.1981)). A Rule 12(b)(6) dismissal will not be affirmed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 101, 2 L.Ed.2d 80 (1957). However, "conclusory allegations or legal

conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Fernandez-Montes v. Allied Pilots Ass'n,* 987 F.2d 278, 284 (5th Cir.1993). In the context of a 12(b)(6) motion in a section 1983 suit, the focus should be "whether the complaint properly sets forth a claim of a deprivation of rights, privileges, or immunities secured by the Constitution or laws of the United States caused by persons acting under color of state law." *Fontana v. Barham,* 707 F.2d 221, 225 (5th Cir.1983). If there is no deprivation of any protected right the claim is properly dismissed. *Id.*

The Plaintiffs make a variety of claims, but their challenges to Rule XX fall into two basic groups. First, they claim that the rule is invalid on its face as an impermissible restriction of the First Amendment freedoms of the individuals and organizations that are parties to this suit. This first type of claim encompasses challenges to both of the substantive changes the LSC has made in Rule XX: the new, more specific indigence requirements as well as the restriction on student representation in the role of an attorney of any group or individual whose representation has been solicited by any person associated with the clinic.

The Plaintiffs' second general claim is that regardless of whether Rule XX, on its face, restricts speech in violation of the First Amendment, the rule was enacted in retaliation for the clinics' and their clients' political speech and advocacy in the Shintech matter, and is therefore an impermissible form of viewpoint discrimination. The Plaintiffs' claim that the LSC amended Rule XX in direct response to pressure from business interests who were

opposed to the TELC's environmental outreach and advocacy. This second claim depends heavily on the motivation of the LSC in enacting Rule XX.

In general, the LSC challenges the standing of all of the Plaintiffs in this suit, and alleges that none of the parties have suffered an injury in fact sufficient to justify this challenge to Rule XX. In response to the first set of claims, the LSC points out that the indigence requirements are not unlike those of several other states and the federal government, that the income level that disqualifies individuals from clinic representation is significantly higher than the standard used by many states and the federal Legal Services Corporation, and that since none of the client organizations are entitled to *pro bono* representation in civil cases there has been no actionable deprivation of any protected right.

The LSC responds to the Plaintiffs' attack on the solicitation restrictions by arguing that there is no right of non-lawyers to represent others in litigation, that the litigation activities the clinics engage in cannot be considered "speech" and that therefore no party's "speech" or other rights have been impacted. The LSC responds to the viewpoint discrimination claims in much the same way, arguing that Rule XX does not affect any party's rights of association or free speech. The LSC argues that although attorneys may have speech and associational freedoms that protect *pro bono* representation of clients for political reasons, lay persons and law students have no such rights. Since Rule XX does not affect the ability of any attorney to represent *pro bono* clients, the LSC argues, the rule does not implicate any protected speech or associational interests.

Thus, this case involves four issues: (1) whether the Plaintiffs have standing; whether Plaintiffs have stated a claim that Rule XX, on its face, violates protected freedoms of speech and association by (2) the tightening of the indigence requirements or by the (3) imposition of solicitation restrictions on student representation in the role of an attorney; and (4) whether the LSC's promulgation of the rule constitutes actionable viewpoint discrimination in this context.

Standing

All of the Plaintiffs in this case fall into one of four categories. The first group is comprised of community organizations and individuals that have either been clients of the student clinics or who are concerned that they will not be able to obtain representation from the clinics in the future. The second consists of law professors and clinical law instructors who oversee or are otherwise involved in the student clinics. The third group consists of three Tulane University law students, two third year students who were "student practitioner" members of TELC during the 1998-99 academic year and one second year student who had been accepted as a TELC member and "student practitioner" for the 1999-2000 academic year. The fourth and last group consists of two student organizations, the Tulane Environmental Law Society (an organization of students that includes some of the students enrolled in the Tulane Environmental Law Clinic) and the Tulane Graduate and Professional Student Association.[5] Neither Tulane University

5. Another individual party plaintiff below (Shearer) did not join in this appeal; consequently, we disregard him.

nor TELC is a party to the suit; nor is any other university or law clinic.

To satisfy the standing requirement, a party must establish basic three elements. First, the plaintiff must have suffered an injury in fact. An "injury in fact" is an invasion of a legally protected interest which is both (a) concrete and particularized, and (b) actual or imminent and not conjectural or hypothetical. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). Second, there must be a causal connection between the injury and the conduct complained of — in other words, the injury must be traceable to the defendant and not the result of the independent action of a third party. *Id.* Third, the injury must be redressible; it must be likely, as opposed to merely speculative, that a favorable decision will redress-the plaintiff's injury. *Id.* The party invoking federal jurisdiction bears the burden of establishing these elements, but "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general factual allegations embrace those specific facts that are necessary to support the claim.' " *Id.* (quoting *Lujan v. National Wildlife Federation,* 497 U.S. 871, 110 S.Ct. 3177, 3189, 111 L.Ed.2d 695 (1990)).

According to the complaint, Rule XX directly regulates the operations of law school clinics in Louisiana and significantly alters the ways in which those clinics can permissibly function. Further, the complaint alleges that under the new rule, several of the client organizations will hereafter be unable to obtain representation from the clinics.

Given the expansive and deferential way in which we construe pleadings at this stage of a suit, we find that Rule XX has enough of an impact on at least some of the Plaintiffs so as to constitute an injury in fact. At least some of the Plaintiffs have standing to bring each type of claim currently before the court. Accordingly, we next address the merits of the Plaintiffs' claims. We begin with the Plaintiffs' claim that the indigence and solicitation restrictions, on their face, improperly infringe on the Plaintiffs' rights under the First Amendment.

Indigence Requirements

Rule XX now requires that clinical student practitioners represent only those individuals who are "indigent," which is defined as having an annual income that is less than 200% of the current federal poverty guidelines as established by the Department of Health and Human Services. Louisiana Supreme Court Rule XX, section 4. As the commentary to Rule XX points out, applying the current federal poverty standards the clinics are permitted to represent an individual if his annual income is less than $16,480, and may represent a family of four if the family's annual income is less than $33,340. *Id.* Contrary to the Plaintiffs' assertions, the rule does not require individuals to provide detailed financial information to obtain representation — the rule simply states that the clinics may only represent individuals who fall within the income guidelines. The Plaintiffs claim that this aspect of the rule subjects their clients to invasive discovery intended to obtain embarrassing financial information. However, the LSC has always required that student practitioners represent only "indigent" community

organizations. *See* Louisiana Supreme Court Rule XX, section 3 (1988). Also, the assertion that improper discovery requests will dramatically increase is clearly based almost entirely on speculation, and in any event can be adequately addressed in any particular instance in which it does arise. This part of the rule does not, on its face, restrict speech in any way other than to limit clinical representation to clients who are poor.

The indigence requirements alone implicate no speech interests, and are simply subject to Equal Protection requirements. Classifications based on wealth alone are not subject to strict scrutiny. *See San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 1293-94, 36 L.Ed.2d 16 (1973). Strict scrutiny, therefore, is inappropriate in a facial challenge of this part of Rule XX. Under rational basis review, the indigence requirements are valid. They are rationally related to one of the stated purposes of Rule XX: providing representation to those who cannot afford it for themselves. *See* Louisiana Supreme Court Rule XX, section 1. Because the indigence requirements do not, on their face, implicate any speech interests the district court was correct to dismiss this part of the Plaintiffs' challenge to Rule XX.

Solicitation Restrictions

The Plaintiffs argue that section 10 of Louisiana Supreme Court Rule XX is an impermissible restriction on their rights of free speech and association protected by the First Amendment. While this may be a closer question than the challenge to the indigence requirements, we conclude that section 10 does not impermissibly restrict the Plaintiffs' speech.

Appendix A

The First Amendment prohibits the government from enacting solicitation restrictions that prevent attorneys from offering their services *pro bono* to individuals or groups. For example, the Supreme Court held in *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), that Virginia could not prohibit the NAACP from advising individuals of their legal rights and referring those individuals to lawyers. And, in *In re Primus,* 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), the Court held that a lawyer could not be constitutionally subjected to discipline for informing members of the public of their legal rights and offering free legal services on behalf of the ACLU. The Plaintiffs cite both *Button* and *Primus* for the proposition that all *pro bono* legal advocacy (even when conducted by persons who are not licensed attorneys) is protected speech that cannot be infringed without a compelling state interest.

A careful examination of those decisions reveals, however, significant differences from the restrictions in the present case. For example, in both *Button* and *Primus,* the solicitous speech was itself prohibited. In *Button,* under Virginia's statute solicitation was a misdemeanor, and the penalties for solicitation included imprisonment for up to six months. *Button,* 83 S.Ct. at 334 n. 7 (citing Va.Code § 54.82 (1958)). Similarly, Edna Primus's letter soliciting a client on behalf of the ACLU was, in and of itself, a violation of the South Carolina bar's disciplinary rules. *See Primus,* 98 S.Ct. at 1898-1900. In both cases, the solicitous speech itself was prohibited, and engaging in such speech subjected the speaker to criminal or disciplinary sanctions.

In contrast, nothing in Rule XX prohibits or prevents speech of any kind. Rule XX does not prevent the clinics or their members from engaging in outreach, or even from contacting particular clients, advising them of their rights, and offering and then proceeding to represent those clients. The rule only prohibits the non-lawyer student members of the clinics from representing *as attorneys* any party the clinic has so solicited. Since the rule does not directly regulate speech and the ability of unlicensed students to practice law need not exist at all, it is inaccurate to describe the restrictions in Rule XX as impairing or prohibiting speech. No one is required to participate in any of the clinical programs, and even if someone chooses to, they are not punished for or prohibited from speaking. At most, Rule XX indirectly discourages speech — by refusing the educational experience of acting *as an attorney* in a particular matter to unlicensed student practitioners in clinics whose members or employees engaged in solicitation of that matter.

The impact of Rule XX's section 10 (see note 4, *supra*) on the educational experience is far from extreme. The students are not prohibited from or restricted in working on clinic solicited cases as paralegals, as legal (or factual) researchers, or as trial assistants,[6] and they are not subject to

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6. Indeed, the students are barred only from serving in an attorney's representative capacity by Rule XX, and could perform a wide variety of legal related work or research, so long as it was reviewed and any formal documents (such as pleadings, motions, agreements or the like) were actually submitted by a licensed supervising attorney.

(Cont'd)

discipline for contacting potential clients and informing them of both their rights and that free legal representation is available from the clinics. And, targeted solicitation only implicates the students' representation as attorneys of that particular client — students would remain free to represent as an attorney other clients who were not solicited by the clinic.[7] These limitations are a far cry from the criminal and disciplinary sanctions invalidated by the Supreme Court in *Button* and *Primus*.[8]

The other major difference between this case and *Button* and *Primus* is, of course, that the student practitioners are not licensed members of the bar. The LSC has a heightened interest in overseeing the practice of law by non-attorneys in Louisiana. Indeed, the LSC need not have ever allowed — and did not at all until relatively recently — non-attorneys to

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(Cont'd)

Nothing in Rule XX (or its challenged amendments) in any way broadens the categories of conduct which constitute the practice of law so as to require one engaging in same to either be a licensed attorney or to come under the exemption for student practitioners provided by Rule XX since 1971.

7. And, of course, the clinic's supervising attorneys could continue to represent any client they wish, including clients who had been solicited.

8. The Court in *Primus* did not hold that all solicitation restrictions were invalid. Instead, the Court noted that in some situations solicitation restrictions on practicing attorneys would be permissible, so long as those restrictions were narrowly tailored and did not impermissibly abridge associational freedoms. *Primus*, 98 S.Ct. at 1908.

participate in the actual practice of law in Louisiana. The ability of students to represent clients as attorneys in legal matters is entirely the relatively recent creation of the LSC and continues to exist entirely at the LSC's complete discretion.[9] The clinical programs are an educational benefit that the LSC has decided to grant to Louisiana law students.

Rule XX's solicitation restrictions do not prohibit or punish speech, they merely limit one aspect of the participation of unlicensed students in clinical education programs — namely doing what only an attorney can otherwise do — to representing as attorneys nonsolicited clients. And, this limitation is entirely viewpoint neutral.[10] Rule XX is significantly different from the criminal or quasi-criminal prohibitions of speech invalidated by the Supreme Court in *Button* and *Primus*. We conclude that the district court was correct to subject section 10 of Rule XX to rational basis review. The stated rationale for section 10 is to further "the Court's policy against solicitation of legal clients generally,

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9. Indeed, the regulation of the practice of law in Louisiana is uniquely within the power of the Louisiana courts: "The right to practice law in the state courts is not a privilege or immunity of a citizen of the United States. It is limited to those who are licensed for that purpose. . . . The supreme court possesses the power, irrespective of the legislature, to determine the qualifications of those who apply for admission to practice law." *State v. Kaltenbach*, 587 So.2d 779, 784 (La.App. 3 Cir.1991) (citing *State v. Rosborough*, 152 La. 945, 94 So. 858 (1922)), *writ denied*, 592 So.2d 1332 (1992).

10. On its face, section 10 of Rule XX is unquestionably viewpoint neutral. We address below the Plaintiffs' claim that the rule was, nevertheless, motivated by a desire to suppress a particular viewpoint.

the ethical prohibitions against attorney solicitation, and the Court's view that law students should not be encouraged to engage in the solicitation of cases. . . ." Louisiana Supreme Court Rule XX section 10, Commentary. Section 10 is rationally related to the LSC's goal of discouraging solicitation generally. The nature of the solicitation provision, combined with the unique status of the clinics' student practitioners, convince us that section 10 of Rule XX is a constitutional exercise of the LSC's regulatory power.

By allowing unlicensed law students at clinics to practice law under limited conditions, the LSC furthers two goals: providing legal representation to poor Louisianians and providing educational opportunities to Louisiana law students. *See* Louisiana Supreme Court Rule XX section 1 ("As one means of providing assistance to clients unable to pay for [legal] services . . . the following rule is adopted.").

In *Legal Services Corporation v. Velazquez,* 531 U.S. 533, 121 S.Ct. 1043, 1049-51, 149 L.Ed.2d 63 (2001), the Supreme Court invalidated a congressional funding restriction that prohibited Legal Services Corporation attorneys from participating in cases attempting to reform or challenge a state or federal welfare system. The Court held that the restrictions unconstitutionally regulated private expression in an arena in which Congress had funded Legal Services Corporation attorneys to represent indigent litigants. *Velazquez,* 121 S.Ct. at 1051-52. A major concern of the Court was that the restrictions would do more than simply prevent representation in certain classes of cases; the restrictions, the Court noted, would interfere with attorneys'

advocacy of their clients by preventing them from making certain arguments in particular cases: "Restricting [Legal Services Corporation] attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys. . . . By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Id.* at 1050-51. The fact that a Legal Services Corporation lawyer could withdraw from a representation if a problem arose did not, according to the Court, alleviate the problems the rule caused. *Id.* at 1051.

In *Velazquez,* the Court noted that "Congress was not required to fund a [Legal Services Corporation] attorney to represent indigent clients; and when it did so, it was not required to fund the whole range of legal representations or relationships. The [Corporation] and the United States, however, in effect ask us to permit Congress to define the scope of the litigation it funds to exclude certain vital theories and ideas." *Velazquez,* 121 S.Ct. at 1052. In contrast to the regulations in *Velazquez,* Rule XX does not limit speech by the clinics' members — any person associated with a clinic can engage in any sort of outreach activity and can even solicit individual clients. Indeed, the clinics are allowed to represent clients so solicited, with one caveat — the students, who are not lawyers, may not represent, *as lawyers,* any client so solicited. Unlike the regulations struck down in *Velazquez,* Rule XX imposes no restrictions on the kind of representations the clinics can engage in or on the arguments that can be made on behalf of a clinic client. Rule XX applies

to all clinic students equally, and is entirely viewpoint neutral. Nothing in Rule XX implicates the proper functioning of the judicial system. None of the special considerations present in *Velazquez* apply in the context of this case.

The parties in *Button* and *Primus* were licenced attorneys, the student clinical practitioners are not. Instead, they are the beneficiaries of an educational program that the LSC has decided to permit and which the LSC could end at will. Moreover, unlike the criminal sanctions and disciplinary penalties involved in *Button* and *Primus,* the restrictions imposed by Rule XX do not regulate or prohibit speech directly. And, none of the special concerns mentioned by the Court in *Velazquez* are implicated by Rule XX. The First Amendment does not prohibit the LSC from imposing this viewpoint neutral limit on the scope of unlicensed law students' educational use, as attorneys, of the Louisiana courts.

Viewpoint Discrimination and Retaliation

Our holding that the solicitation requirements are facially permissible does not end our inquiry. The Plaintiffs also claim that the enactment of Rule XX constitutes an unconstitutional attempt by the Court to suppress political speech it has deemed undesirable. Specifically, the Plaintiffs allege that the Governor and various business interests pressured the Court into enacting Rule XX because of the success of the clinics and community organizations in their attempts to resist the construction of chemical plants in their communities. The Plaintiffs argue that even if Rule XX is

an otherwise permissible restriction, the Court's allegedly suppressive motivation in enacting Rule XX transforms the rule into an unconstitutional action. Since the rule is facially viewpoint neutral and is not otherwise constitutionally objectionable, this claim depends entirely on the effect the Court's alleged motivation has on the constitutionality of Rule XX.

Although the jurisprudence in this area is less than clear, there is some support for the Plaintiffs' contentions that the motivation of a state actor can transform an otherwise permissible action into a violation of the First Amendment. The Supreme Court has held that the motivation of a legislature or other state actor can be the primary factor in the constitutional analysis of state action in other areas of First Amendment law, such as cases involving the Establishment Clause or the termination of public employees because of protected speech. *See, e.g., Edwards v. Aguillard,* 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (striking down a state statute requiring equal time for "creation-science" based on the motivation of the legislature as indicated in the statute's legislative history); *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 2698, 33 L.Ed.2d 570 (1972) (finding a suit by a junior college professor whose contract had not been renewed, allegedly because of the professor's public criticism of the Board of Regents, to present a "bona fide constitutional claim").

In *Cornelius v. NAACP Legal Defense and Educational Fund,* 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985), the Supreme Court upheld as against a facial challenge an executive order which limited participation in a charity drive

among federal employees (the "CFC") to organizations that provided direct health and welfare services to individuals or their families. The order excluded legal defense and political advocacy groups. The district court and the court of appeals had sustained the facial challenge, but had not addressed the argument of the plaintiffs (respondents), the NAACP Legal Defense & Education Fund and other legal defense funds, that they were excluded from the CFC because the government disagreed with their viewpoints. The Supreme Court reversed the decisions of the lower courts facially invalidating the order. The court went on to state, however:

> "While we accept the validity and reasonableness of the justifications offered by petitioner for excluding advocacy groups from the CFC, those justifications cannot save an exclusion that is in fact based on the desire to suppress a particular point of view."
>
> . . . .
>
> ". . . the purported concern to avoid controversy excited by particular groups may conceal a bias against the viewpoint advanced by the excluded speakers. . . . Organizations that do not provide direct health and welfare services, such as the World Wildlife Fund, the Wilderness Society, and the United States Olympic Committee, have been permitted to participate in the CFC . . . .the issue whether the Government excluded respondents because it disagreed with their viewpoints was neither decided below nor fully briefed before this Court. We decline to decide in the first instance

> whether the exclusion of respondents was impermissibly motivated by a desire to suppress a particular point of view. Respondents are free to pursue this contention on remand."

Id. at 3454.

This language in *Cornelius* provides the Plaintiffs with some support for their claim, but is not controlling in the present context. *Cornelius* involved a rule which actually *prevented* certain groups from speaking. The executive order in *Cornelius* was viewpoint neutral, but it did exclude speakers from a nonpublic forum on the basis of both their identity and the content of their speech. *Id.* at 3451. Those speakers were shut out of a forum of which they might otherwise have availed themselves, and in that way the order directly regulated speech within that forum. Other speakers, such as the Wilderness Society, were not excluded. Rule XX, in contrast, does not create a forum for speech,[11] does not exclude any speaker from any opportunity to speak, and does not in any way prohibit or punish speech. Nor does Rule XX in any way distinguish between speakers on the basis of the content of their message. There is no "picking and choosing" here. Instead, the Plaintiffs allege, the rule makes it somewhat more difficult to obtain and to provide free legal services. While *Cornelius* does indicate that an individual or group cannot be excluded from even a nonpublic forum on the basis of viewpoint, we do not agree with the Plaintiffs that the case requires us to examine the motivation underlying every governmental decision for viewpoint neutrality.

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11. Nor do Plaintiffs argue that Rule XX creates any kind of forum for speech.

Additionally, the Plaintiffs' assertion that *Cornelius* stands for the proposition that the motivation or purpose of a state actor can turn *any* state action into an unconstitutional suppression of speech or viewpoint is belied by the Court's decision in *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991). In *Rust,* the Supreme Court upheld Department of Health and Human Services regulations that attached several conditions on the receipt of federal funds for Title X projects. Among the regulations were requirements that Title X projects refrain from providing counseling concerning abortion as a method of family planning, and programs that received Title X money were expressly prohibited from referring a pregnant woman to an abortion provider, even upon request. *Rust,* 111 S.Ct. at 1765 (citing 42 C.F.R. § 59.8(a)-(b) (1989)). The Supreme Court held that the government was entitled to "refus[e] to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* at 1773. The restrictions on speech upheld in *Rust explicitly* prohibited the expression of a particular viewpoint by program participants. In later cases, the Court has limited the holding of *Rust* to occasions in which the government itself is the speaker, or to "instances, like *Rust,* in which the government 'used private speakers to transmit information pertaining to its own program.' " *Velazquez,* 121 S.Ct. at 1048 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 2519, 132 L.Ed.2d 700 (1995)).

There are differences between *Rust* and the present case. The LSC is not itself a speaker — there is no government message that the clinics are relaying to their clients. And, Rule XX does not clearly qualify as an attempt by the LSC

to use private speakers to transmit information pertaining to its own program. On the other hand, the LSC need not have allowed any unlicensed student to serve in an attorney representative capacity. The Court has chosen to allow the unlicensed student clinic members to engage in the practice of law in Louisiana under certain conditions. Although the court is not funding the clinics, the LSC is supporting those clinics by its allowance of unlicensed students' representation in the role of attorneys of clinic clients — an allowance that the Court was under no obligation whatsoever to grant.

The analogy between *Rust* and the present case is an imperfect one, but we think that *Rust,* while not controlling, informs our current decision. The fact that the state decides to fund or support a program does not give the government *carte blanche* to restrict the rights of program participants. *See Velazquez,* 121 S.Ct. at 1049-50; *Rust,* 111 S.Ct. at 1776. But, at the same time, the LSC must be able to define the scope of the law practice that unlicensed students undertake as part of the clinical programs. We accordingly turn to an examination of the effects of Rule XX and the alleged motivation of the LSC in its enactment. The issue here is whether the Plaintiffs' allegations of suppressive purpose, if true, would render Rule XX unconstitutional.

The Plaintiffs have alleged facts that may arguably support their claim that the LSC reacted to pressure from the Governor and business interests who bore the TELC significant animus. But the Plaintiffs' allegations of improper purpose, while extensive, do not focus on the LSC. Although the Plaintiffs have certainly alleged animus on the part of the Governor and various business groups, there is no express

allegation, nor do the facts alleged tend to suggest, that the LSC itself bore any particular ill will towards any of the Plaintiffs. Instead, the complaint in essence alleges that the LSC gave in to pressure from others to restrict the activities of the student clinics. The Plaintiffs allege that Rule XX was enacted to silence the TELC, but the rule is of wholly general and prospective application — it applies to all student legal clinics in Louisiana, not just TELC. Plaintiffs can be understood to have asserted that the LSC ultimately bore some character of ill will towards the TELC, at least on account of its activities having generated unwanted political pressure on the LSC, and that the LSC accordingly desired to defuse the political pressure, and to diminish the likelihood of the recurrence of similar activities in the future, by enacting the challenged amendments to Rule XX. Such an alleged motivation on the part of the LSC does not, however, transform Rule XX into an unconstitutional state action.

The fundamental purpose behind the First Amendment is to promote and protect the free expression of ideas, unfettered by government intrusion. We are convinced, however, that Rule XX will produce no legally significant chilling effect on the expressive speech of any of the Plaintiffs in this case. Rule XX does in effect impose some restrictions on clinic activities, and, according to the complaint, the solicitation restrictions and the new, more strict indigence requirements will result in a decrease in the availability of clinical representation for some of the Plaintiffs. Some of the client organizations in this case may indeed find it somewhat more difficult to qualify for clinic representation in the wake of Rule XX, and the clinics themselves will either be forced to change their educational

model or to refrain from soliciting particular clients. But, even this minimal impact on the clinics and the client organizations is "suppressive" *only in comparison to the earlier version of Rule XX.* This is a crucial distinction. We conclude that a refusal to promote private speech is not on a par with a regulation that prohibits or punishes speech, or which excludes a speaker from a public or nonpublic forum.[12] Rather than stamping out or suppressing private speech, the LSC's action has reduced the availability of support for such speech, and the LSC — the highest judicial body in Louisiana exercising its undisputed power and responsibility — has reduced this support by *an across-the-board, wholly prospective and viewpoint neutral general rule.* We are convinced that the new version of Rule XX will not silence any group or individual's speech except to the extent that it ceases to support private speech. The United States Constitution does not require the LSC to continue its support for the clinical education programs until its motives are shown to be pure. The LSC need not have ever allowed unlicensed students to practice law in Louisiana, and indeed did not do so until 1971, and that Court can end the program at any time, and for any reason.[13] The motivation of the LSC,

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12. Nor does Rule XX impermissibly interfere with the content of the private speech promoted as in *Velazquez.*

13. At oral argument, the Plaintiffs asserted that even a complete refusal to allow unlicensed students to practice law in Louisiana could be considered a violation of the First Amendment if the change was motivated by a desire to suppress political speech. We do not agree that the First Amendment requires the LSC to continue, in perpetuity, an optional program that allegedly benefits a particular political viewpoint once that program has begun.

in this limited context, is irrelevant. As the Supreme Court stated in *Rust*, "[t]his is not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope." *Rust*, 111 S.Ct. at 1772-73. The LSC's amendment of Rule XX does not, under these circumstances, constitute impermissible viewpoint discrimination in violation of the First Amendment.

Conclusion

For the foregoing reasons, the judgment of the district court dismissing the action is

AFFIRMED.

APPENDIX B — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED JULY 27, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

No. CIV. A. 99-1205

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, LOUISIANA CHAPTER, et al.

v.

SUPREME COURT OF THE STATE OF LOUISIANA

July 27, 1999.

* * *

ORDER AND REASONS

FALLON, District Judge.

Before the Court is the Motion of Defendant Louisiana Supreme Court to Dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and for lack of standing.

For the following reasons, the Defendant's Motion to Dismiss pursuant to Rule 12(b)(6) is hereby GRANTED, and the Plaintiffs' Complaint is hereby DISMISSED with prejudice, and with costs.

Appendix B

BACKGROUND

A. Factual Overview

In 1971, the Louisiana Supreme Court adopted Rule XX, entitled "Limited Participation of Law Students in Trial Work." *See* La. Sup.Ct. R. XX. Section 1 of the Rule stresses the primary responsibility of the bench and bar for supplying legal services to all persons, including those unable to afford them. Section 1 further declares that the adoption of Rule XX should serve "[a]s one means of providing assistance to clients unable to pay for such services and to encourage law schools to provide clinical instruction in trial work of varying kinds." *Id.* § 1. The Rule permits an eligible law student to appear in court or before administrative tribunals in a representative capacity on behalf of the state, its subdivisions, or any indigent person. *See id.* § 3. The Louisiana Supreme Court amended the original rule in 1988 to include student representation of indigent community organizations.

Over the years several law school sponsored clinics, including the Tulane Environmental Law Clinic ("TELC"), have supplied legal advice and representation to various indigent community organizations. According to the Plaintiffs' Complaint, sometime around November 1996 Plaintiff St. James Citizens for Jobs & the Environment ("St. James") sought TELC's assistance in opposing the construction of a polyvinyl chloride and ethylene dichloride production facility by Shintech in the St. James Parish town of Convent. *See* Pls.' Compl., ¶ 23. St. James opposed the plant's location on the grounds that, as a small, lower income and predominantly African-American community, Convent

was already host to a disproportionate share of chemical facilities posing risks to both the environment and to the health of local inhabitants. St. James avers that it was unable to secure legal representation in its fight against Shintech from any source other than TELC.

TELC appeared at hearings on behalf of St. James and some of the other Plaintiffs to this suit, and opposed the Shintech project. After the Louisiana Department of Environmental Quality ("LDEQ") submitted proposed air permits for the plant, TELC filed objections to them with the U.S. Environmental Protection Agency ("EPA"). In April 1997, EPA instructed LDEQ to reevaluate the proposals in light of the environmental justice concerns raised by TELC on behalf of its clients. *See id.* ¶ 26. TELC then filed additional objections, contending that the air permits violated a Presidential Executive Order on environmental justice as well as Title VI of the Civil Rights Act of 1964. Shintech eventually decided to locate elsewhere.

Plaintiffs allege that TELC's successful advocacy "provoked intense criticism and retribution" from business and political leaders around Louisiana. *See id.* ¶ 28. They further assert that the Governor, citing concerns that TELC and other groups like it were discouraging business investment in Louisiana, mounted an aggressive campaign aimed at galvanizing business interests to exert pressure on Tulane University to reign in the clinic. *See id.* ¶¶ 28-29. In turn, these business groups sent a series of letters to the Louisiana Supreme Court, complaining about TELC's activities and asking for tighter regulation of student practice. *See id.* ¶¶ 30-40. After conducting an investigation,

the Supreme Court on June 17, 1998 amended Rule XX to impose additional regulations on the operation of student clinics throughout the State. Rule XX was thereafter amended on two occasions, and on March 22, 1999, the Louisiana Supreme Court published the latest version, which became effective April 15, 1999, and is the primary focus of this lawsuit.

The Rule as finally amended provides in relevant part:

> Section 4. Standard for Determining Eligibility for Representation. Law School clinical program staff and student practitioners who appear in a representative capacity pursuant to this rule may represent any individual or family unit whose annual income does not exceed 200% of the federal poverty guidelines established by the Department of Health and Human Services. These guidelines need not be applied when the client is court-appointed or court-referred and the appointing or referring court has reviewed the economic condition of the client and has determined that the client is indigent.
>
> Section 5. Representation of Indigent Community Organizations. Any indigent community organization that wishes to obtain representation pursuant to this rule must certify in writing to the inability to pay for legal services. The written certification shall be subject to inspection by the Supreme Court of Louisiana.

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Law school clinical program staff and student practitioners who appear in a representative capacity pursuant to this rule may represent any indigent community organization provided at least 51% of the organization's members are eligible for legal assistance pursuant to Section 4 of this rule. The indigent community organization shall also provide information to clinic staff which shows that the organization lacks, and has no practical means of obtaining, funds to retain private counsel.

Section 7. The certification of a student by the law school dean . . . (c) May be terminated by this court at any time without notice or hearing and without any showing of cause.

Section 10. Lawyer staffpersons of law school clinical programs and certified student practitioners shall adhere to the Rules of Professional Conduct, including the rules prohibiting solicitation of cases or clients. In addition, no student practitioner shall appear in a representative capacity pursuant to this rule if any clinical program supervising lawyer, staffperson, or student practitioner initiated in-person contact, or contact by mail, telephone or other communications medium, with an indigent person or indigent community organization for the purpose of representing the contacted person or organization.

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> Section 12. Nothing contained in this rule shall affect the right of any person who is not admitted to practice law to do anything that he/she might lawfully do prior to the adoption of this rule.

La. Sup.Ct. R. XX.

B. Procedural History

1. Plaintiffs' Complaint

On April 16, 1999 Plaintiffs instituted this suit pursuant to 42 U.S.C. § 1983, styled as "an action to preserve access to legal representation for individuals and community organizations in Louisiana who seek to enforce public laws and advance the public good, but who cannot afford to retain private counsel." Pls.' Compl., ¶ 1. Plaintiffs comprise twenty-one separate parties, including ten community organizations allegedly in need of law clinic representation ("client-plaintiffs"), five law school professors who are licensed attorneys and act as clinic instructors ("professor-plaintiffs"), two student groups and three individual students claiming direct interests in clinical education programs ("student-plaintiffs"), and one private, individual donor of funds to TELC ("donor-plaintiff"). Plaintiffs name the Louisiana Supreme Court as sole Defendant and seek declaratory and injunctive relief, asking this Court to declare the amendments to Rule XX unconstitutional under both the United States Constitution and the Constitution of the State of Louisiana.

In their Complaint, Plaintiffs list eight specific bases for the relief sought by asserting that the Rule XX

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Amendments: 1) constitute impermissible viewpoint discrimination in violation of both the First Amendment of the United States Constitution and Article I, Section 7 of the Louisiana Constitution; 2) violate Equal Protection under the Fourteenth Amendment as well as Article I, Section 3 of the Louisiana Constitution by discriminating against Plaintiffs on the basis of their political views; 3) infringe Plaintiffs' rights of freedom of speech, association, and to petition government for redress of grievances under the First Amendment and Louisiana Constitution, by placing restrictions on student solicitation of clients and cases (Rule XX, Section 10); 4) impinge on the academic freedom of professors and students in contravention of the First and Fourteenth Amendments and Article I, Sections 7, 9, and 23 of the Louisiana Constitution by imposing the newer, more restrictive income requirements potential clients must meet in order to qualify for representation (Rule XX, Sections 4 and 5); 5) violate the First and Fourteenth Amendments in addition to Article I, Sections 7, 9, and 22 of the Louisiana Constitution because the new income guidelines and allegedly intrusive verification procedures suppress Plaintiffs' freedom of speech, freedom of association, and right to petition government for redress of grievances (Rule XX, Section 5); 6) are unconstitutionally vague and overbroad in that the financial disclosure and certification requirements contained in Rule XX, Section 5 provide insufficient guidance on how to comply, thereby violating the rights of the clients, students, and professors under the First and Fourteenth Amendments and Article I, Section 7 of the Louisiana Constitution; 7) violate the donor's rights to freedom of speech and association to advance his beliefs by contributing funds, contrary to the First and Fourteenth

Amendments and to Article I, Sections 7, 9, and 22 of the Louisiana Constitution; and 8) violate Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment as well as Article I, Section 2 of the Louisiana Constitution by virtue of the arbitrary and capricious manner in which the Rule XX Amendments were adopted, depriving them of fundamental rights without fair notice or any opportunity to be heard.

Plaintiffs ask this Court to declare the Rule XX Amendments unconstitutional, and grant preliminary and permanent injunctive relief against their enforcement and against any disciplinary action by Defendant against any Plaintiff or other attorney based on the Amendments. Plaintiffs also seek an injunction directing Defendant to reinstate Rule XX as it existed prior to the 1998 and 1999 Amendments. Finally, Plaintiffs pray for costs and attorneys' fees pursuant to 42 U.S.C. § 1988.

2. Defendant's Motions

The Louisiana Supreme Court filed two motions on May 26, 1999, asking this Court to dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), or alternatively for lack of standing, and to grant a stay of discovery pending the Court's ruling on the Motion to Dismiss. At oral argument on July 21, 1999, this Court granted the Motion to Stay Discovery pending a ruling on the Motion to Dismiss, reserving to the parties their right to reurge any discovery matters after such ruling.

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In its Motion to Dismiss, Defendant takes the position that Plaintiffs state no colorable cause of action since there exists no statutory or constitutional right of a nonlawyer to represent individuals or organizations, nor is there any right of a litigant to legal representation in civil cases. Defendant views the Complaint as an attempt by the Plaintiffs to establish a rule giving nonlawyers unilateral permission to solicit clients and to appear in court and assert the rights of others.

Defendant further maintains that this Court lacks jurisdiction over Plaintiffs' asserted violations of the Louisiana Constitution, as the Eleventh Amendment to the United States Constitution operates to bar state law claims against a nonconsenting state in federal court. Defendant then attacks the standing of each group of Plaintiffs to prosecute this suit, arguing that the absence of the predicate rights to nonlawyer representation or to legal counsel in a civil case prevents them from pleading any injury sufficient to establish standing under the United States Supreme Court's decision in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Defendant seeks dismissal of the case at Plaintiffs' cost.

3. Plaintiffs' Response

Plaintiffs' filed their opposition on July 13, 1999, contending that both motions should be denied. As for the Motion to Dismiss, Plaintiffs maintain that it completely misconstrues the theory underlying their Complaint. They insist that this case is not about recognizing a constitutional right for nonlawyers to represent clients, or about creating a similar right of litigants to civil representation. At the core

of this dispute, rather, is the Louisiana Supreme Court's exercise of its power to regulate the legal profession in an unconstitutional manner. Plaintiffs attest that the ability to represent others is amenable to First Amendment protection, and that, under the standard of review for a Rule 12(b)(6) motion, dismissal is inappropriate where a party has made claims such as viewpoint discrimination or impingement of free speech, which raise inherently factual issues.

ANALYSIS

A. Standard of Review

When considering a motion to dismiss pursuant to Rule 12(b)(6), a court "must accept all material allegations of the complaint as true and construe them in the light most favorable to the nonmoving party." *Garrett v. Commonwealth Mortgage Corp. of America,* 938 F.2d 591, 593 (5th Cir.1991). Dismissal is not appropriate unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hernandez v. Maxwell,* 905 F.2d 94, 96 (5th Cir.1990). In making this determination, the Fifth Circuit has stated that it is inappropriate to go beyond the face of the pleadings. *See id.*

In analyzing a suit instituted under 42 U.S.C. § 1983 in the context of a Rule 12(b)(6) motion, the initial inquiry is "whether the complaint properly sets forth a claim of a deprivation of rights, privileges, or immunities secured by the Constitution or laws of the United States caused by persons acting under color of state law." *Fontana v. Barham,* 707 F.2d 221, 225 (5th Cir.1983). A court must focus on the

plaintiff's complaint, the nature of the purported protected interest, and the nature of the alleged deprivation. *See id.* Failure of the complaint to set forth a deprivation of a protected interest warrants dismissal of the case. *See id.* Section 1983 does not "open[ ] the federal courthouse doors to relieve the complaints of all who suffer injury at the hands of the state or its officers." *Id.* (quoting *White v. Thomas,* 660 F.2d 680, 683 (5th Cir.1981)).

This Court's focus, then, should be on whether the Plaintiffs allege the deprivation of interests protected by the Constitution or other laws of the United States. If the Complaint cannot satisfy this threshold showing, dismissal is appropriate.

B. The Eleventh Amendment Bars Plaintiffs' State Law Claims

The Defendant takes the position that the Eleventh Amendment to the United States Constitution prohibits Plaintiffs from seeking in federal court a declaration that the Rule XX Amendments violate the Louisiana Constitution. The United States Supreme Court has pronounced the basic maxim that, under the Eleventh Amendment, "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan,* 415 U.S. 651, 662-63, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).[1] The U.S. Supreme Court has elaborated on this

1. The Eleventh Amendment does not, however, bar a federal court from granting prospective injunctive relief against state officials whose enforcement of particular laws would violate the Fourteenth Amendment. *See id.* at 664, 94 S.Ct. 1347 (discussing *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)).

doctrine in a series of cases, the most relevant for purposes of this dispute being *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984).

In *Pennhurst,* the Supreme Court reiterated its position that the Eleventh Amendment's jurisdictional bar to suit against a state or one of its agencies in federal court applies regardless of the relief sought. *See id.* at 100, 104 S.Ct. 900. The Court then extended this rule by concluding that "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when . . . the relief sought and ordered has an impact directly on the State itself." *Id.* at 117, 104 S.Ct. 900. The decision determined that this principle controls even state law claims brought into federal court under pendent jurisdiction. *See id.* at 121, 104 S.Ct. 900.

The Fifth Circuit has previously recognized that the Louisiana State Bar Association is an agent of the Louisiana Supreme Court and that it may therefore invoke Eleventh Amendment protection. *See Lewis v. Louisiana State Bar Ass'n,* 792 F.2d 493, 497 (5th Cir.1986). By implication, similar relief is available to the Louisiana Supreme Court itself. *See id.* at 497-98.

Plaintiffs urge *Word of Faith World Outreach Ctr. Church, Inc. v. Morales,* 986 F.2d 962 (5th Cir.1993), for the proposition that "*Pennhurst* does not affect a federal court's jurisdiction to determine whether state officials have violated state law when such a determination is a necessary antecedent to resolving the merits of a federal law claim."

Pls.' Mem. Opp'n, at 44. They contend that since violations of state law form the basis of their federal claims, and because they are seeking to enforce federal law, *Pennhurst* does not apply to this action. *See id.*

In *Word of Faith,* the Fifth Circuit refused to find an Eleventh Amendment prohibition to federal jurisdiction because the Texas Attorney General had acted beyond the scope of the authority conferred on him by state law, thereby rendering himself subject to suit in his individual capacity. *See* 986 F.2d at 965-66. The panel noted, however, that this holding was not inconsistent with *Pennhurst,* since in that case there was no allegation that the state officers in question were acting in other than their official capacities. *See id.* at 966. The opinion added that nothing in *Pennhurst* prevents a federal court from construing state law to divine whether or not an official is exceeding his or her authority. *See id.* Thus the cases draw a distinction between a federal court construing state law to determine whether a state official has acted in either an individual or official capacity, and actually entertaining a lawsuit against a state in which state law claims form the basis of the complaint.

The command of *Pennhurst* seems clearly applicable to this dispute. Plaintiffs' allegations that Rule XX in its current form violates the Louisiana Constitution are purely state law claims, lodged against a state entity that is entitled to invoke the Eleventh Amendment. While this Court agrees with Plaintiffs that *Pennhurst* does not preclude a separate determination that Rule XX violates the United States Constitution, finding a contravention of Louisiana's Constitution is not a "necessary antecedent" to resolving the

federal claims raised here. To the extent that this Court finds it necessary to construe state law to ascertain whether violations of federal law have occurred, it possesses the inherent power to do so without the prerequisite that the Complaint contain specific state law allegations. *Pennhurst* controls this case, and Plaintiffs' state law claims must be dismissed as jurisdictionally barred. *See generally Alden v. Maine,* 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (recognizing the States' immunity from suit as a fundamental aspect of sovereign immunity protected by the Constitution).

C. The Complaint Fails to State the Deprivation of Any Cognizable Federal Right

The Complaint contains allegations that Rule XX in its current form deprives the Plaintiffs of their federal constitutional rights. In essence, Plaintiffs express two concerns, objecting both to the income criteria for determining which individuals or organizations qualify for clinic representation, and to the restrictions placed on students appearing in a representative capacity on behalf of solicited clients. Because the Plaintiffs in this case are comprised of four discrete groups, it is helpful to examine each category's claims separately to determine whether any state a cause of action.

1. The Client-Plaintiffs

The first group of complainants are the ten community organizations asserting that the new clinic regulations violate their constitutional rights by depriving them of the ability to

speak, associate, and petition government freely, without fear of harassment or discrimination on the basis of their viewpoint. These groups also maintain that the income guidelines imposed by Rule XX infringe on their protected right to collective activity by compelling the disclosure of sensitive, private financial information that could expose their members to retaliation. They assert that application of the income criteria will force them to segregate their members along economic lines, further abridging their freedom of association.

The Defendant argues that, at bottom, the client-plaintiffs' claim is that "individuals and organizations have a right to have representation in civil matters." Def.'s Mem. Supp. Mot. Dismiss, at 22. Because no such right exists, the client-plaintiffs lack a critical predicate to stating the deprivation of a protected interest sufficient to survive a Rule 12(b)(6) motion. *See id.* at 23.

Plaintiffs' response is that their objections address the deprivation of fundamental constitutional rights which are independent of any right to counsel. Rule XX operates to restrict these rights and is therefore unconstitutional regardless of the existence of an antecedent right to representation in civil matters. *See* Pls.' Mem. Opp'n, at 5-8.

The parties appear to agree, and the law is clear, that there is no constitutional right to legal representation in a civil case. *See Bass v. Perrin,* 170 F.3d 1312, 1320 (11th Cir.1999); *United States v. Sardone,* 94 F.3d 1233, 1236 (9th Cir.1996). Under U.S. Supreme Court jurisprudence, "[t]he

pre-eminent generalization that emerges . . . on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." *Lassiter v. Department of Soc. Servs. of Durham County, N.C.*, 452 U.S. 18, 25, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). "It is against this presumption that all the other elements in the due process decision must be measured." *Id.* at 27, 101 S.Ct. 2153. The Fifth Circuit has explained this rule to mean that there is no Sixth Amendment right to appointment or effective assistance of counsel in a civil case. *See Salmon v. Corpus Christi Indep. Sch. Dist.*, 911 F.2d 1165, 1166 (5th Cir.1990); *Sanchez v. United States Postal Serv.*, 785 F.2d 1236, 1237 (5th Cir.1986).

Even in the criminal context, there are limits on the type of legal assistance an indigent may obtain. For example, in recognizing a fundamental right of access to courts for prison inmates, the U.S. Supreme Court has cautioned that acknowledgment of a prisoner's right to adequate legal resources for pursuing redress to actual harms "did not create an abstract, freestanding right to a law library or legal assistance, [and] an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is sub-par in some theoretical sense." *Lewis v. Casey*, 518 U.S. 343, 351, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). Thus even in the case of prisoners, no right to legal assistance, let alone counsel, exists without some concrete, particularized injury. *See id.* at 351-52, 116 S.Ct. 2174.

The significance of *Lewis* is that, even where there is a generally recognized constitutional right to legal assistance,

that entitlement remains subject to certain constraints. In view of the sort of burdens on legal aid to prisoners allowed by the Supreme Court, it is difficult to see how rules which may incidentally erect boundaries to the availability of civil representation can give rise to constitutional claims, especially when no right to civil representation exists in the first instance.

The Plaintiffs rely on cases such as *In re Primus,* 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), and *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), for the proposition that representation of public interest groups organized for the purpose of collective political expression is amenable to First Amendment protection. While those decisions indeed buttress such a contention, they are distinguishable from this case. In those disputes, the government regulations at issue operated directly on the community organizations themselves, or on any and all licensed attorneys who were employed, associated, or otherwise regularly affiliated with those groups. Regulation of the groups' lawyers thus placed a direct restraint on the *right,* as well as the ability, of those organizations to advance the causes for which they were formed.

Here we confront the regulation of nonlawyers who are not directly employed, associated, or otherwise affiliated with the client-plaintiffs. The only connection alleged between the clinics and the client-plaintiffs is a history of past representation and a desire for future representation. Any licensed attorneys, including the clinics' law professors, whom the client-plaintiffs hire, or who volunteer their services to the client-plaintiffs, would not be limited by Rule

XX in any fashion with regard to the scope of their advocacy. The organizations in this suit remain free to act in any way they choose, unburdened by the strictures of Rule XX, whereas the groups or lawyers in *Primus* and *Button* found themselves legally barred from certain activities no matter who carried out the representation. To the extent that the amendments might affect the client-plaintiffs' expressive activities, they only impact the community organizations' preferred *channel* for advocating, as opposed to their *right* to do so. Although the Plaintiffs surely feel otherwise, this Court is of the view that this distinction matters from a constitutional standpoint.

The client-plaintiffs argue that this reasoning rings hollow, since they cannot effectively exercise their rights without law clinic representation due to their inability to secure legal services from any other source. In essence, the client-plaintiffs' complaint is that the manner in which Rule XX constricts the operation of law clinics interferes with their ability to exercise their constitutional rights in a legal forum. One cannot exercise rights in a legal forum without representation by counsel. This purported intrusion upon the client-plaintiffs' rights, then, necessarily presupposes a right to representation in the civil context. Here, the civil representation at issue is that provided by the students in the law clinics. As the cases cited earlier demonstrate, no such right exists in civil cases.

Without a predicate right to representation in civil cases, the essential bridge to stating a claim that regulation of the clinics burdens the client-plaintiffs' constitutional rights collapses. Rule XX does not operate upon the client-plaintiffs

at all unless they voluntarily seek to engage the services of TELC or its brethren. Under no set of facts can these community organizations establish that Rule XX impinges a legally protected interest, so that they fail to state a claim under 42 U.S.C. § 1983. Their claims, therefore, must be dismissed.

2. The Donor-Plaintiff

This category consists of one individual Plaintiff who asserts that Rule XX implicates his constitutional rights due to the manner in which the new conditions imposed on the clinics dictate how they spend the private funds he contributes. He insists that the Amendments interfere with the independent pedagogic judgment of the clinic professors and limit their freedom to advance the causes he intends to support. In this way, Rule XX impinges on the donor-plaintiff's own constitutional right to express and advance his beliefs.

Defendant asserts that the donor-plaintiff's claim must be dismissed because of his failure to demonstrate standing. The suggestion that Rule XX controls the use of private funds is unsupportable because the rule applies instead to the conduct of nonlawyer representation in Louisiana courts. Moreover, the donor-plaintiff's purported injury is too theoretical to establish standing under U.S. Supreme Court precedents.

Among other authorities, Plaintiffs cite *Colorado Republican Fed. Campaign Comm. v. FEC,* 518 U.S. 604, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) (plurality opinion),

for the proposition that government "may not restrict or coercively discourage speech simply because it involves the expenditure of money." Pls.' Mem. Opp'n, at 38. The Plaintiffs' brief in this area relies on several decisions dealing with the question of government regulation of political campaign contributions and expenditures as a burden on First Amendment rights. Presumably their argument is that the donor-plaintiff's situation is analogous to that of a contributor to a political campaign.

On its face, Rule XX nowhere imposes any limit on the amount of funds an individual or organization may contribute to law school clinics, nor does it prescribe how such donations may be spent. The argument is that, though facially neutral, the Amendments have the effect of dictating how the clinics utilize the private funds they receive, thereby curtailing the scope of expression the donor-plaintiff seeks to achieve through his contributions. Even assuming as true the Plaintiffs' contention that the application of Rule XX burdens the expenditure of private funds for political expression, the case law does not support the notion that this automatically rises to an unconstitutional constraint on a donor's speech or expression. *See, e.g., Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam) (upholding limits on the amount that any one person or group may contribute).

Plaintiffs' position also seems to be that the burden at issue is not the imposition of a particular spending limit, but the way in which Rule XX controls how funds are spent. Nothing in Rule XX prohibits the donor-plaintiff from contributing funds directly to the community organizations

he seeks to support, however. He is free to distribute and condition the use of money to them in any way he desires, preserving his right to express himself through donations, to the degree such a right even exists. At most, the donor-plaintiff's objection is that Rule XX restricts his ability to channel funds to their ultimate recipients, the community groups, in the manner he sees fit.

This Court does not read any of the cases cited by Plaintiffs to stand for the proposition that a donor has a constitutional right to demand that funds he supplies be expended in a certain way, particularly when the complained of regulation burdens the conduit (i.e., TELC), and not the ultimate recipient, of the donation, and when the donor remains completely free to provide funds directly to the beneficiary in any amount and under any conditions he deems appropriate.

Even if Rule XX, which on its face does not mention financial donations, somehow implicated a right to contribute, this Court fails to see how the donor-plaintiff can show that the Rule constrains that interest, since he remains free to exercise this right through direct donations to the community groups themselves. The donor-plaintiff's grievance is not cognizable under 42 U.S.C. § 1983, and his claims must be dismissed.

3. The Professor-Plaintiffs

The law faculty's complaint is that Rule XX inhibits their ability to recruit clients for, and engage students in, the types of cases which afford the best possible teaching and

learning opportunities. They insist that this burdens their constitutional rights to freedom of association with students, freedom of speech, and academic freedom.

The Defendant attacks the faculty's standing to raise such claims. It takes the position that they do not allege a particularized injury or invasion of any legally protected interest, since nothing in Rule XX controls their actions inside or outside the classroom. They remain free to speak or associate in any way they see fit and in any forum they desire. In essence, Defendant's response is that the Amendments have no impact on how the professors themselves, as licensed attorneys, practice law or advocate for clients of their own choosing.

The professor-plaintiffs rely on, among others, cases such as *Edwards v. Aguillard,* 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987), and *Regents of the Univ. of California v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), for the proposition that courts apply exacting scrutiny to legislative attempts to "interfere with the ability of teachers to educate in the manner they deem appropriate." Pls.' Mem. Opp'n, at 23. Those cases, however, involved legislative actions, laws, or other government policies which, in one fashion or another, directly regulated the operation of the academic institutions concerned. Here Rule XX does not operate directly on the schools themselves, but indirectly by controlling what law students are permitted to do outside the classroom, as part of clinical training. Plaintiffs undoubtedly feel this is another distinction without a difference, but the critical contrast is that in many of cases cited, government was requiring schools to do certain things,

while in this situation the Amendments simply place limits on what students can do under certain narrowly defined circumstances.

The Court is of the opinion that, at its core, the professor-plaintiffs' grievance is that the Amendments deprive them of the freedom to instruct and employ law students in whatever fashion they desire. The professor-plaintiffs are not complaining that Rule XX impinges their own right to espouse any theory or advocate any idea in the classroom, but that it intrudes upon a derivative right, one drawn from the supposed freedom of law students to obtain a clinical education in the manner that is most pedagogically beneficial. Maximizing the academic experience is certainly a laudable goal and is the very cornerstone of higher education, but this lofty aim is nevertheless subject to legitimate societal boundaries.

From an incremental perspective, the professor-plaintiffs' argument involves three steps. First, the faculty assert a free speech right to tell students how they should practice, implying that any limitations on this right constitute impermissible government interference. Second, they posit a right to show or demonstrate to law students how to practice law, further suggesting that any curtailment of this freedom automatically violates the principle of academic freedom. Finally, the professor-plaintiffs want their students to learn by doing, and when government impedes the faculty from accomplishing this objective in the manner they deem most appropriate, by placing limits on what the faculty can permit students to do, it has infringed the faculty's constitutional right to teach freely.

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Taken to its logical conclusion, the right the faculty implores this Court to recognize is one that bestows upon professors unfettered discretion to instruct students, not only in the classroom but also in the "real-world" context, in whatever manner they choose so long as the professors feel it is the most pedagogically beneficial. Under this theory, a professor supervising a criminal law clinic might determine that the best educational experience for students would be to first learn how it feels to be a criminal and to spend time incarcerated. If the Louisiana Supreme Court then amended Rule XX to prohibit student practitioners from any activity that might constitute a crime, this would automatically burden the professors' constitutional rights. While this may actually be true in a purely theoretical sense, it is clear that the State could constitutionally proscribe such behavior. In this case, the Rule XX Amendments more narrowly define the students' already limited privilege to engage in what would otherwise be the unauthorized practice of law. To place restrictions on such a privilege burdens the professors' rights no more than the above hypothetical proscription against criminal law clinic students engaging in criminal activity.

In short, Rule XX does not prohibit the professor-plaintiffs from representing or soliciting whomever they wish, or from employing students in any *non* representative capacity they desire, just as any licensed attorney would rely on a student law clerk or paralegal. If it is within the province of the Louisiana Supreme Court to erect boundaries to student practitioners' authority to appear in court, then it is also appropriate for the same limitations to govern how professors direct those students. This Court cannot discern any

cognizable injury wrought upon the professor-plaintiffs by Rule XX, and their claims must be dismissed.

4. The Student- and Student-Organization Plaintiffs

The students and student organizations object that Rule XX infringes their constitutional rights because it detracts from their educational opportunities and burdens their ability to associate and advocate for expression of collective views. Because the new Amendments deprive them of a critical aspect of clinical legal training, the student-plaintiffs maintain that they have suffered a concrete, particularized injury to a protected interest.

Defendant argues that the students cannot state a constitutional claim because there is no predicate right of a nonlawyer to practice law. Law students enjoy no constitutional right to represent others in court, and the Louisiana Supreme Court can impose restrictions on their ability to practice without implicating fundamental freedoms. As for the student organizations, Defendant's reasoning is that they lack standing to assert a right, on behalf of the students, that does not even exist in the first instance.

The Plaintiffs do not contest the propositions that there exists no fundamental right of a nonlawyer to practice law, and that courts possess the inherent power to regulate both lawyers and clinical law student practice. *See* Pls.' Mem. Opp'n, at 5; *see also Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 43 (5th Cir.1992); *Ex parte Steckler*, 179 La. 410, 154 So. 41, 44-45 (1934); *Drew v. Unauthorized Practice of Law Comm.*, 970 S.W.2d 152, 155 (Tex.App.

1998). The natural corollary of this rule is that nonlawyer students may practice only with the permission of the Louisiana Supreme Court, and then only under the guidelines promulgated by that tribunal. The students insist, however, that the Louisiana Supreme Court may not regulate their ability to practice in ways that violate the United States Constitution.

One of the Plaintiffs' arguments addresses the manner in which Rule XX uses the federal poverty guidelines to place restrictions on who the clinics may represent. Section 4 dictates that lawyer staff persons and students appearing in a representative capacity may "represent any individual or family unit whose annual income does not exceed 200% of the federal poverty guidelines established by the Department of Health and Human Services." Sup.Ct. R. XX § 4. The complaint is that this ceiling, coupled with the restrictions contained in Section 5, forces the clinics to decline representation of certain, otherwise qualified groups on the basis of their income. In short, the students complain that this provision prevents them from representing more affluent individuals or organizations.

Courts routinely uphold the utilization of income levels as criteria for conditioning certain public benefits. *See, e.g., Downhour v. Somani,* 85 F.3d 261, 270 (6th Cir.1996) (validating state statute which used 600% of federal poverty guidelines as the basis for determining whether or not it was permissible to balance bill groups of Medicare recipients). Significantly, *Downhour* also held that, at least under the circumstances of that dispute, "the constitutional right to privacy does not extend to protect the plaintiffs' desire not

to disclose their private financial information." *Id.* The U.S. Supreme Court has further stated that, "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 24, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

The use of these very same federal poverty guidelines by the Legal Services Corporation ("LSC") to determine eligibility for free legal services for the poor is standard practice, and the Second Circuit has found that subsequent Congressional restrictions on lobbying activities by LSC did not discriminate against speech on the basis of viewpoint. *See Velazquez v. Legal Servs. Corp.,* 164 F.3d 757, 767-68 (2d Cir.1999).

Plaintiffs' rejoinder is that all of these decisions somehow involved the use of public funds. The clinics receive only private funds, so that their situation is distinguishable. Upon closer review, this distinction is not so great. Although the Louisiana Supreme Court does not offer public funding for legal services for the poor, through the mechanism of Rule XX it does supply "labor" for the provision of legal services to the poor. By allowing students to represent indigents, the State is essentially offering free assistance through the students themselves, rather than through public funds. By analogy, then, the State should be permitted to employ the same guidelines for determining who will receive these limited public resources. This is especially true in the present case, where the income guidelines adopted by Rule XX are in fact more generous than those used by LSC itself. While the maximum annual income level for

representation under LSC rules is 125% of the federal poverty guidelines, Rule XX sets a limit of 200%. *See* La. Sup.Ct. R. XX § 4 cmt. (1999). This in spite of the fact that, according to the amicus curiae brief filed by Louisiana Appleseed, Louisiana ranked forty-seventh in the nation in personal income in 1989. *See* La. Appleseed Amicus Brf., at 4. Consistency would seem to require that income guidelines be structured to ensure that the poorest of the poor have their needs met before permitting those in less dire circumstances to receive free aid. When viewed from this perspective, the new burdens placed on student representation does not seem egregious.

From its inception in 1971, the purpose of Rule XX has been similar to the role envisioned for LSC: to provide legal services to the indigent, while simultaneously affording students enhanced educational opportunities. Thus Rule XX has always had a public service orientation, one geared towards supplying needed legal services to those least able to pay for them. Without any income criteria whatsoever for determining who might qualify for aid, it is conceivable that the poor themselves might not receive any legal assistance. The amicus briefs indicate that the poorest of the poor in Louisiana are not having their legal needs met. *See id.* at 5-8. To the extent that student practitioners seek to use their time and resources offering assistance to clients whose income exceeds 200% of the federal poverty guidelines, they further deprive the very poorest people in Louisiana of an opportunity for legal representation. Income restrictions are not an improper method for conditioning the availability of free legal services, since they are consistent with the original purpose of Rule XX. In light of the foregoing, it seems quite

a stretch to suggest, as Plaintiffs do, that use of income guidelines to condition a benefit somehow violate freedom of speech or association.

Another of the students' primary objections to Rule XX involves Section 10, which imposes restrictions on their ability to solicit potential clients, and on their freedom to appear in a representative capacity on behalf of clients whom clinic lawyers or staffpersons have solicited. *See* La. Sup.Ct. R. XX § 10. At the outset it is important to note that the Louisiana Supreme Court possesses " 'exclusive and plenary power to define and regulate all facets of the practice of law, including . . . the client-attorney relationship.' " *Dodson,* 951 F.2d at 43 (quoting *Succession of Wallace,* 574 So.2d 348, 350 (La.1991)). This authority necessarily must encompass appropriate regulation of the solicitation of clients. Indeed, this Court cannot conceive of many functions closer to the core of the Louisiana Supreme Court's responsibilities to the bar than the regulation of solicitation, an area pregnant with concerns for protection of the public and the appropriate conduct of attorneys. While free speech rights do exist in this area, they are precariously perched when balanced against the imperatives of protecting the public and monitoring professional ethics. Particularly where student solicitation of potential clients is involved, concern for protecting the public grows considerably.

The Commentary to Section 10 indicates that the Louisiana Supreme Court was concerned with the possibility that future attorneys' first experience with solicitation might occur in the law school setting, during their embryonic stage, before they have had the opportunity to mature into

full-time, practicing lawyers. *See* La. Sup.Ct. R. XX § 10 cmt. (1999). This is a legitimate state interest and a proper matter for the Supreme Court to address. There are also legitimate concerns that students engaged in solicitation might unintentionally mislead or oversell clinic services to the public. It is significant that the only restriction placed on solicitation by licensed clinic attorneys is that students would not be permitted to appear in a representative capacity in such cases. This leaves the door open for students to participate in solicited cases in other fashions, and to become fully involved, including in a representative capacity, in cases that the clinics have not solicited. Finally, the Commentary notes that the Rule is not designed to "in any way restrict or prohibit law school clinical activities which are intended to provide education or information to Louisiana citizens." *Id.* In short, this Court is of the opinion that Section 10 does not implicate the students' constitutional freedoms due to the Louisiana Supreme Court's inherent power to regulate student practice, and even if it did, the Court believes that Section 10 strikes the proper balance between the government and individual interests at stake. It is rationally related to a legitimate state interest. *See generally City of New Orleans v. Dukes,* 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); *Williamson v. Lee Optical of Okla.,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

D. Summary

This Court is aware that it is considering a 12(b)(6) motion. The burden on the movant in such a motion is heavy. Nevertheless, failure of a complaint to set forth a deprivation of a protective interest compels its dismissal. Nonlawyers

have no constitutional or legal right to represent individuals or organizations in courts or before administrative tribunals. Rule XX authorizes law students in clinics to do so on a limited basis. The limitations are rationally related to legitimate state interests. They are an appropriate exercise of the Supreme Court's duty, responsibility and power. There is no protective interest and thus there can be no deprivation.

Once the rhetoric has been stripped away from this dispute, what essentially remains is the Plaintiffs' assertion that the change in Rule XX was precipitated by political pressure, and was not based on any improper conduct on the clinics' part. The Plaintiffs allege that this political pressure took the form of letters and public comments directed at the Louisiana Supreme Court Justices during an election campaign, and point to the close temporal relationship between the business community's expressions of outrage and the subsequent changes to Rule XX. This may well raise an issue in need of closer examination and debate, but the forum for addressing such questions is more properly a political, not a judicial, one. According to Justice Douglas, the Constitution may not be used to strike down state action because it is unwise, improvident, or out of harmony with a particular school of thought. *See Williamson,* 348 U.S. at 488, 75 S.Ct. 461.

Plaintiffs have not alleged purposeful discrimination against a suspect or quasi-suspect classification. The only classification they invoke is based on income, to which the U.S. Supreme Court applies rational basis review. *See San Antonio Indep. Sch. Dist.,* 411 U.S. at 28-29, 93 S.Ct. 1278. Heightened scrutiny is therefore not triggered here unless a

fundamental right is at stake. As this Court has stated, no such rights are implicated in this case.

Consequently, the Louisiana Supreme Court's actions were not illegal or unconstitutional, and if they were precipitated by some otherwise nondiscriminatory political motive, such motivation by itself does not automatically equate to an unconstitutional or even an improper motive, nor does it transform a constitutional exercise of authority into an unconstitutional one. If this were possible, then the reverse would also have to be true: an unconstitutional act could be metamorphosed into a constitutional one by the mere presence of a pure, nondiscriminatory motive. Cherished freedoms, such as freedom of speech, press and religion, could be jeopardized by the actions of a well-meaning, beneficent despot. This proposition is most assuredly incorrect. Furthermore, in Louisiana, where state judges are elected, one cannot claim complete surprise when political pressure somehow manifests itself within the judiciary.

The aim of the law clinics and the dedication of their staffs and students are indeed laudable. They should be commended for their enthusiasm, hard work, and willingness to devote time and effort toward altruistic endeavors. The Court recognizes the pronounced degree of anger, angst, and frustration they are experiencing as a result of this alteration in the practice rules. To them, such a change appears unfair. However, unfairness does not always automatically rise to the level of unconstitutionality. Indeed, it rarely does. The connection between these two concepts that the Plaintiffs seek to draw simply does not exist in this case. Their energies

would more properly be focused on the political rather than the legal system.

CONCLUSION

The Plaintiffs' state law claims are barred by the Eleventh Amendment prohibition against suing a state in federal court for alleged violations of state law. As to the Plaintiffs' federal constitutional claims, this Court does not believe that the modifications to Rule XX implicate any cognizable protected interest as to any of the various parties. Even if such fundamental rights as the Plaintiffs invoke were in fact at risk here, the Rule XX Amendments are narrowly tailored to achieve the important state interests in ensuring that the clinics remain true to their original purpose of providing legal services to those least able to afford them and in regulating the degree to which nonlawyers are able to participate in solicited cases. The Rule XX Amendments are not vague or overly broad, and they represent a constitutional exercise of the Louisiana Supreme Court's authority.

For the foregoing reasons, IT IS ORDERED that the Defendant Louisiana Supreme Court's Motion to Dismiss pursuant to Rule 12(b)(6) is hereby GRANTED, and the Plaintiffs' Complaint is hereby DISMISSED with prejudice, and with costs.

APPENDIX C — RULE INVOLVED

RULES OF SUPREME COURT OF LOUISIANA

RULE XX. LIMITED PARTICIPATION OF LAW STUDENTS IN TRIAL WORK

Section 1. The bench and the bar are primarily responsible for providing competent legal services for all persons, including those unable to pay for these services. As one means of providing assistance to clients unable to pay for such services and to encourage law schools to provide clinical instruction in trial work of varying kinds, the following rule is adopted.

Section 2. All actions provided for and allowed to an eligible law student herein shall be limited to law school sponsored and supervised programs on an individually selected case basis approved, assigned, and controlled by the law school.

Section 3. Under such law school sponsored clinical instruction plan an eligible law student may appear in any court or before any administrative tribunal in this state on behalf of the state, any political subdivision thereof, or any indigent person or indigent community organization if the person on whose behalf the student is appearing has indicated in writing consent to that appearance and the supervising lawyer has also indicated in writing approval of that appearance, in the following matters:

(a) Any civil matter where the law student does not charge a client for his/her services; however, the supervising attorney is entitled to be awarded attorney's fees and costs for the services rendered

by the student attorney and supervising attorney in those cases where the awarding of attorney's fees and costs is provided by statute.

(b) Any criminal matter in which an indigent defendant does not have the right to the assignment of counsel under any constitutional provision, statute, or rule of this court. In such cases the supervising lawyer is not required to be personally present in court if the person on whose behalf an appearance is being made consents to the lawyer's absence.

(c) Any criminal matter in which the defendant has the right to the assignment of counsel under any constitutional provision, statute, or rule of this court. In such cases the supervising lawyer must be personally present throughout the proceedings and shall be fully responsible for the manner in which they are conducted.

(d) An eligible law student may also appear in any criminal matter on behalf of the state with the written approval of the prosecuting attorney or his/her authorized representative and of the supervising lawyer.

(e) In each case the written consent and approval referred to above shall be filed in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal.

(f) The procurement and filing of written consent shall not be required when the indigent client is court appointed and unable to provide written consent or approval.

Section 4. Standard for Determining Eligibility for Representation. Law school clinical program staff and student practitioners who appear in a representative capacity pursuant to this rule may represent any individual or family unit whose annual income does not exceed 200% of the federal poverty guidelines established by the Department of Health and Human Services. These guidelines need not be applied when the client is court-appointed or court-referred and the appointing or referring court has reviewed the economic condition of the client and has determined that the client is indigent.

Section 5. Representation of Indigent Community Organizations. Any indigent community organization that wishes to obtain representation pursuant to this rule must certify in writing to the inability to pay for legal services. The written certification shall be subject to inspection by the Supreme Court of Louisiana.

Law school clinical program staff and student practitioners who appear in a representative capacity pursuant to this rule may represent any indigent community organization provided at least 51% of the organization's members are eligible for legal assistance pursuant to Section 4 of this rule. The indigent community organization shall also provide information to clinic staff which shows that the organization lacks, and has no practical means of obtaining, funds to retain private counsel.

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Section 6. In order to make an appearance pursuant to this rule, the law student must:

(a) Be duly enrolled in this state in a law school approved by the American Bar Association.

(b) Have completed legal studies amounting to at least four fulltime semesters, or the equivalent if the school is on some basis other than a semester basis.

(c) Have completed the required law school coursework in legal ethics.

(d) Be certified by the dean of the student's law school as being of good moral character and competent legal ability, and as being adequately trained to perform as a legal intern.

(e) Be introduced to the court in which the student is appearing by an attorney admitted to practice in that court.

(f) Neither ask for nor receive any compensation or remuneration of any kind for his/her services; except that the supervising attorney may be awarded fees and costs as provided by Section 3(a); and any funds so generated shall be deposited into a special litigation expense account maintained by the clinical program for that purpose.

(g) Certify in writing that the law student has read and will abide by the Rules of Professional Conduct, will faithfully perform the duties of a law student practitioner, and will not place his/her personal interests or clinic interests ahead of the interests of the client. The written certification shall be filed with the clerk of this court.

(h) Shall take the following oath:

"I, _____, do solemnly swear that I will support the Constitution of the United States and of the State of Louisiana and have read and am familiar with the Rules of Professional Conduct of the Louisiana State Bar Association; I understand that I am bound by the precepts therein contained as fully as if I were admitted to the practice of law in Louisiana; I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land; I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor and will never seek to mislead the judge or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my client; I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness unless

required by the justice of the cause with which I am charged; I further accept the privileges granted to me as well as the responsibilities which will devolve upon me, so that I may be more useful through my clinical education in the service of justice."

Section 7. The certification of a student by the law school dean:

(a) Shall be filed with the clerk of this court and unless it is sooner withdrawn it shall remain in effect until the expiration of twelve months after it is filed or until the announcement of the results of the first bar examination following the student's graduation, whichever is earlier. For any student who passes that examination or who is admitted to the bar without taking an examination, the certification shall continue in effect until the date the student is admitted to the bar.

(b) May be withdrawn by the dean at any time by mailing a notice to that effect to the clerk of this court. It is not necessary that the notice state the cause for withdrawal.

(c) May be terminated by this court at any time without notice or hearing and without any showing of cause. Notice of the termination may be filed with the clerk of this court.

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Section 8. In addition, an eligible law student may engage in other activities under the said law school program under the general supervision of a member of the bar of this court but outside the personal presence of that lawyer, including:

(a) Preparation of pleadings and other documents to be filed in any matter in which the student is eligible to appear, but such pleadings or documents must be signed by the supervising lawyer.

(b) Preparation of briefs, abstracts, and other documents to be filed in appellate courts of this state, but such documents must be signed by the supervising lawyer.

(c) Each document or pleading must contain the name of the eligible law student who has participated in drafting it. If the student participated in drafting only a portion of it, that fact may be mentioned.

An eligible law student may participate in oral argument in any appellate court of this state, but only in the presence of the supervising lawyer.

Section 9. The member of the bar under whose supervision an eligible law student does any of the things permitted by this rule shall:

(a) Be a lawyer admitted to practice before this court whose service as a supervising lawyer for

this program is approved by the dean of the law school in which the law student is enrolled.

(b) Assume personal professional responsibility and liability for the student's guidance in any work undertaken and for supervising the quality of the student's work.

(c) Assist the student in his/her preparation to the extent the supervising lawyer considers it necessary.

(d) Counsel and assist the law student who practices law pursuant to this rule, and provide professional guidance in every phase of such practice, with special attention to matters of professional responsibility and legal ethics.

Section 10. Lawyer staffpersons of law school clinical programs and certified student practitioners shall adhere to the Rules of Professional Conduct, including the rules prohibiting solicitation of cases or clients. In addition, no student practitioner shall appear in a representative capacity pursuant to this rule if any clinical program supervising lawyer, staffperson, or student practitioner initiated in-person contact, or contact by mail, telephone or other communications medium, with an indigent person or indigent community organization for the purpose of representing the contacted person or organization.

Section 11. A law student who practices law pursuant to the authority conferred by this rule must obtain additional

authority from the appropriate court or agency to practice before courts and agencies of the federal government, and courts and agencies of other states. The authority conferred by this rule shall also not be deemed to constitute authority for student practitioners who act pursuant to this rule to make appearances in a representative capacity before regular or special sessions of state or federal legislatures.

Section 12. Nothing contained in this rule shall affect the right of any person who is not admitted to practice law to do anything that he/she might lawfully do prior to the adoption of this rule.

APPENDIX D — COMPLAINT DATED APRIL 16, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 99-1205

SECTION L (4)

HON. Eldon Fallon

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, LOUISIANA CHAPTER; ST. JAMES CITIZENS FOR JOBS AND THE ENVIRONMENT; CALCASIEU LEAGUE FOR ENVIRONMENTAL ACTION NOW; HOLY CROSS NEIGHBORHOOD ASSOCIATION; FISHERMEN'S AND CONCERNED CITIZENS' ASSOCIATION OF PLAQUEMINES PARISH; ST. THOMAS RESIDENTS COUNCIL; LOUISIANA ENVIRONMENTAL ACTION NETWORK; LOUISIANA ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW; NORTH BATON ROUGE ENVIRONMENTAL ASSOCIATION; LOUISIANA COMMUNITIES UNITED; ROBERT KUEHN; CHRISTOPHER GOBERT; ELIZABETH E. TEEL; JANE JOHNSON; WILLIAM P. QUIGLEY; TULANE ENVIRONMENTAL LAW SOCIETY; TULANE UNIVERSITY GRADUATE AND PROFESSIONAL STUDENT ASSOCIATION; INGA HAAGENSON CAUSEY; CAROLYN DELIZIA; DANA HANAMAN; and C. RUSSELL H. SHEARER,

Plaintiffs,

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VERSUS

THE SUPREME COURT OF THE
STATE OF LOUISIANA,

Defendant.

COMPLAINT

Plaintiffs, through their undersigned counsel, as and for their Complaint against defendant the SUPREME COURT OF THE STATE OF LOUISIANA ("LOUISIANA SUPREME COURT"), allege as follows:

NATURE OF THE ACTION

1. This is an action to preserve access to legal representation for individuals and community organizations in Louisiana who seek to enforce public laws and advance the public good, but who cannot afford to retain private counsel. This is also an action to preserve First Amendment rights of free expression and association. The plaintiffs, community organizations in Louisiana, clinical faculty at Tulane and Loyola law schools, law school clinic students and student associations, and a financial supporter of clinical legal education and representation, sue the sole defendant, the LOUISIANA SUPREME COURT, to enjoin as unconstitutional the enforcement of its March 22, 1999 Amendments to Rule XX of the Rules of the Supreme Court of Louisiana ("Rule XX Amendments") which govern law school-sponsored clinical legal instruction and representation in the Louisiana state courts.

2. The Rule XX Amendments bar student practitioners from representing (a) any individual, unless the income of the potential client is low enough to meet a rigid standard of indigency set by the LOUISIANA SUPREME COURT; (b) any organization, unless the potential client organization (i) obtains evidence of the incomes of its members, (ii) demonstrates that the incomes of 51 percent of its members meet the same standard of indigency applicable to individuals, (iii) formally certifies, subject to inspection by the LOUISIANA SUPREME COURT and potentially by others, that the standard of indigency is met, and (iv) demonstrates that the organization cannot afford to hire private counsel; and (c) any individual or organization that has been contacted by law school clinic faculty, lawyers, students, or staff for the purpose of providing law school clinic representation.

3. As set forth in greater detail below, the Rule XX Amendments are unconstitutional for multiple reasons, including the following:

(a) The Rule XX Amendments result from the effort of the LOUISIANA SUPREME COURT to effectuate the will of the Governor of Louisiana and certain organized business interests in Louisiana, and suppress the views of Louisiana residents seeking to protect the public health and environment, by curtailing the availability of high quality legal representation as provided by the Tulane Environmental Law Clinic ("TELC") to clients who are unable to afford private counsel;

(b) Although the LOUISIANA SUPREME COURT has asserted that the Rule XX Amendments are intended to benefit indigent persons and community organizations, their actual impact has been the opposite. In violation of speech and associational rights protected by the First Amendment of the United States Constitution and parallel provisions in the Louisiana State Constitution, the Rule XX Amendments have drastically curtailed access to state courts for individuals and community organizations who lack the resources to retain private counsel, harmed TELC and other law school clinics in Louisiana, prevented individuals and community organizations from obtaining the representation they need, and interfered with donors' efforts to support clinical legal education;

(c) The Rule XX Amendments impermissibly burden plaintiff organizations' First Amendment guarantees of freedom of speech and freedom of association, freedom to petition the government for redress, and the guarantees of equal protection and due process of law, because the LOUISIANA SUPREME COURT lacks a sufficient interest to justify the extremely rigid income guidelines and intrusive income verification procedures that it has imposed. The Rule XX Amendments fail to take into account whether organizations, as opposed to their members, can afford private counsel. They also fail to consider the extensive costs of complex litigation as well as whether potential law school clinic clients have financial obligations that make it impossible for them to afford private counsel. They force community organizations that have a genuine

need for counsel but are unable to afford it to segregate their members based on income levels, and to exclude members whose incomes are above the threshold for law school clinic representation. They further fail to account for the stifling effects on membership and association suffered by client groups in attempting to meet and verify compliance.

(d) The Rule XX Amendments unconstitutionally restrict the freedom of people in Louisiana to learn about their legal rights. The Rule XX Amendments restrict the freedom of law school clinics to associate with individuals and community organizations in order to educate them about their rights, and, if necessary, provide them with legal representation. By barring law school clinic staff from contacting individuals and organizations for the purposes of offering the free legal services of law student practitioners, the Rule XX Amendments prevent public interest lawyers from exercising the constitutionally protected right to go into communities to help people understand and defend their rights.

(e) Although the plaintiffs believe that clinical legal representation should be reserved for clients unable to afford private counsel, and although the law school clinics at Tulane and Loyola have provided their services only to individuals and organizations that their faculty believe are unable to afford private counsel, the LOUISIANA SUPREME COURT has violated the plaintiffs' freedoms of speech and association by attempting to dictate how private law schools should use

non-state resources. The Rule XX Amendments also directly violate the First Amendment rights of financial supporters of law clinics who contribute funds for this work because of their belief in the importance of ensuring access to justice for all people, not just those with extensive financial resources.

4. This lawsuit is brought under 42 U.S.C. §§ 1983 and 1988(b), the First and Fourteenth Amendments of the Constitution of the United States, and Article I, Sections 2, 3, 5, 7, 9, and 22 of the Constitution of the State of Louisiana of 1974.

BACKGROUND

5. In the summer of 1997, defendant, the LOUISIANA SUPREME COURT, began an investigation into clinical legal education programs at Tulane, Loyola, and Southern University Law Schools as a result of intense political pressure applied by the Governor of Louisiana and powerful business interests (the "Complainants"). The Complainants urged the LOUISIANA SUPREME COURT to prohibit or drastically curtail TELC's representation of indigent clients who sought to enforce public laws that would protect, preserve, and restore the environment and public health in Louisiana. Since its founding, TELC has represented dozens of clients in hundreds of matters related to the environment.

6. At the time the Complainants began lobbying the LOUISIANA SUPREME COURT to stop TELC's representation of indigent clients, the Complainants represented business interests involved in legal proceedings

against those same TELC clients. For example, business interests representing the Complainants were involved in a hard-fought legal dispute with clients of TELC relating to environmental permits required for the construction of a polyvinyl chloride plant by Shintech Inc. and its affiliates ("Shintech") in the predominantly African-American, lower-income community of Convent in St. James Parish, Louisiana. As a result of TELC's successful representation of indigent groups in the Shintech case, the Complainants sought to compel a retaliatory "investigation" of TELC and to prevent TELC from providing free legal representation to its clients who otherwise are unable to obtain counsel to vindicate their rights.

7. The LOUISIANA SUPREME COURT has publicly admitted that its investigation of the three law school clinics, which was instigated by the Complainants, did not uncover a single legal or ethical violation by TELC or any other law school clinic. The public statements and representations of the LOUISIANA SUPREME COURT indicate that the investigation did not uncover a single case in which TELC or any other law school clinic provided legal services to any group or individual that was able to afford private counsel or where the law school clinic, its staff, or its student practitioners engaged in any sort of professional misconduct. The LOUISIANA SUPREME COURT has refused to release its final report and other materials concerning the results of its investigation to plaintiffs or the public.

8. Nevertheless, in direct response to the unsubstantiated charges by the Complainants, the LOUISIANA SUPREME COURT drastically curtailed the law school clinics' ability

to represent indigent clients through the promulgation of the Rule XX Amendments (effective as of April 15, 1999). The Rule XX Amendments challenged herein by plaintiffs would:

> (1) prohibit clinics from representing any individual client, unless the income of the client is low enough to meet a rigid standard of indigency set by the LOUISIANA SUPREME COURT;
>
> (2) prohibit clinics from representing any community organization unless the organization can prove that at least 51 percent of its members meet the same restrictive indigency standard the LOUISIANA SUPREME COURT set for individuals;
>
> (3) compel the members of community organizations seeking representation by the clinics to disclose sensitive private financial and other information, and compel the organizations themselves to produce written certification of their inability to afford private counsel, subject to inspection by the LOUISIANA SUPREME COURT and potentially by others; and
>
> (4) prohibit student practitioners from representing any indigent individual or community organization if any clinical supervising lawyer, staff person, or student practitioner initiated any contact or communication with the client for the purpose of representing that client.

9. Upon information and belief, the unlawful Rule XX Amendments have transformed Rule XX into the most restrictive student practice rule of any state in the country,

and have effectively blocked TELC and other law school clinics from representing any community organizations in new matters. (A very limited grandfather clause exception allows law school clinics to represent current clients in existing matters.)

10. As set forth below, plaintiffs allege that the restrictions imposed by defendant, the LOUISIANA SUPREME COURT, abridge their freedom of speech, freedom of association, and right to petition the government for redress of grievances in violation of the First and Fourteenth Amendments to the United States Constitution, and Article I, Sections 5, 7, 9, and 22 of the Louisiana State Constitution, and deny plaintiffs the equal protection and due process of the laws in violation of the Fourteenth Amendment to the United States Constitution and Article I, Sections 2 and 3 of the Louisiana State Constitution.

11. Plaintiffs seek a declaratory judgment and preliminary and permanent injunctive relief enjoining defendant, the LOUISIANA SUPREME COURT, from enforcing or otherwise implementing the Rule XX Amendments, and a declaration that the Rule XX Amendments violate plaintiffs' constitutional rights under the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 3, 5, 7, 9, and 22 of the Louisiana State Constitution.

JURISDICTION AND VENUE

12. This court has jurisdiction of the subject matter of this action pursuant to 28 U.S.C. § 1331 and 42 U.S.C.

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§ 1983. The court has supplemental jurisdiction over the plaintiffs' claims arising under state law under 28 U.S.C. § 1367. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because a substantial part of the events giving rise to the claims occurred in this district and defendant, the LOUISIANA SUPREME COURT, may be found in this district.

PARTIES

The Client-Plaintiffs

13. Plaintiffs SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, LOUISIANA CHAPTER ("SCLC"), ST. JAMES CITIZENS FOR JOBS AND THE ENVIRONMENT ("ST. JAMES CITIZENS"), CALCASIEU LEAGUE FOR ENVIRONMENTAL ACTION NOW ("CLEAN"), HOLY CROSS NEIGHBORHOOD ASSOCIATION ("HOLY CROSS"), FISHERMEN'S AND CONCERNED CITIZENS' ASSOCIATION OF PLAQUEMINES PARISH ("FISHERMEN'S ASSOCIATION"), ST. THOMAS RESIDENTS COUNCIL ("RESIDENTS COUNCIL"), LOUISIANA ENVIRONMENTAL ACTION NETWORK ("LEAN"), LOUISIANA ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW ("LOUISIANA ACORN"), NORTH BATON ROUGE ENVIRONMENTAL ASSOCIATION ("NBREA"), and LOUISIANA COMMUNITIES UNITED ("LCU") (collectively, the "client-plaintiffs") are membership organizations and nonprofit corporations that are, have been, and/or wish to be represented by law school clinics and student practitioners who are subject to the Rule XX

Amendments, and/or whose members are, have been, and/or wish to be represented by law school clinics and student practitioners who are subject to the Rule XX Amendments, and who, along with their members, are and have been injured by the Rule XX Amendments. The client-plaintiffs have sought or need to obtain the services of the law school clinics, but are barred from obtaining the services of the law clinics by some or all of the unlawful and restrictive eligibility requirements imposed by the Rule XX Amendments.

(a) Plaintiff SCLC is affiliated with the Southern Christian Leadership Conference, a not-for-profit organization that advocates fundamental human and civil rights for all people. SCLC has litigated on behalf of its members and others, through the law school clinics, in opposition to the toxic hazards posed by certain industrial development in communities throughout Louisiana, and especially those where poor people and people of color reside. SCLC does not have sufficient resources to retain private counsel.

(b) Plaintiff ST. JAMES CITIZENS is an unincorporated community organization with membership consisting of over one hundred residents of St. James Parish, a rural, predominantly poor and working-class parish. ST. JAMES CITIZENS was formed in August, 1996 by residents of St. James Parish who were concerned about the proliferation of hazardous waste, chemical, and other industrial facilities in their communities, and the effects that those facilities have on their health and welfare. ST. JAMES CITIZENS does not have sufficient resources to retain private counsel.

(c) Plaintiff CLEAN was founded in 1982 by residents of the Lake Charles area of Southwestern Louisiana who are concerned about the health and safety of community residents due to dangers posed by the high concentration of polluting facilities in their community and throughout Louisiana. CLEAN does not have sufficient resources to retain private counsel.

(d) Plaintiff HOLY CROSS was founded in 1981 by residents and business owners of the Holy Cross neighborhood of New Orleans, Louisiana to make the neighborhood a safer, cleaner, and more enjoyable place to live and rear a family. HOLY CROSS does not have sufficient resources to retain private counsel.

(e) Plaintiff FISHERMEN'S ASSOCIATION is a twenty-year-old, non-partisan, interracial organization with over one hundred members. It fosters political participation, fair representation, and equal rights for all citizens of Plaquemines Parish. FISHERMEN'S ASSOCIATION does not have sufficient resources to retain private counsel.

(f) Plaintiff RESIDENTS COUNCIL was founded in 1976 to represent the interests of the residents of the St. Thomas Housing Development, a federal public housing complex in New Orleans, Louisiana. RESIDENTS COUNCIL promotes the interests of the tenants in matters affecting them both individually and collectively. All residents of the St. Thomas Housing Development who are at least 18 years old and appear on a St. Thomas Housing Development lease are eligible

to vote for the twelve-member Residents Council Board. RESIDENTS COUNCIL does not have sufficient resources to retain private counsel.

(g) Plaintiff LEAN, formed in 1986 by several environmental groups, is a coalition of 87 member organizations and over 1,000 individuals in Louisiana concerned about the state of the environment and its effects on the health and well-being of Louisiana citizens. LEAN seeks to create, maintain, and preserve a clean and healthy environment, and it achieves its goals through education, outreach, advocacy, and litigation. LEAN does not have sufficient resources to retain private counsel.

(h) Plaintiff LOUISIANA ACORN is a 23-year-old community organization comprised of thousands of families, and most of its members have low or moderate incomes. LOUISIANA ACORN engages in advocacy and education and is particularly concerned with protecting its members and their families from environmental hazards. LOUISIANA ACORN does not have sufficient resources to retain private counsel.

(i) Plaintiff NBREA is an unincorporated community organization based in northern East Baton Rouge Parish, a predominantly poor to middle-class African-American community which has been overwhelmed by toxic industrial emissions that have negatively affected public health. NBREA was founded in 1989 to fight pollution and environmental racism. NBREA supports responsible industrial development —

development that is safe, does not pollute the environment, provides jobs for community residents, and is responsive to the needs and concerns of the communities where development takes place. NBREA does not have sufficient resources to retain private counsel.

(j) Plaintiff LCU, founded in 1997, is a coalition of 20 community, church, and union groups in the Mississippi River Parishes of Ascension, Iberville, St. James, East Baton Rouge, and St. Charles. LCU and its member organizations work on community issues including education, recreation, economic development, and environmental quality through research, organizing, public education, and mutual cooperation and support. Neither LCU nor its member organizations has sufficient resources to retain private counsel.

14. In addition to having standing in their own right, the client-plaintiffs have standing in this action because their members would otherwise have standing to sue in their own right, neither the claims asserted nor the relief requested requires the participation of individual members in the lawsuit, and the interests that the client-plaintiffs seek to protect are germane to the organizations' purposes.

The Law Professor-Plaintiffs

15. Plaintiffs ROBERT KUEHN ("KUEHN"), CHRISTOPHER GOBERT ("GOBERT"), ELIZABETH E. TEEL ("TEEL"), JANE JOHNSON ("JOHNSON"), and WILLIAM P. QUIGLEY ("QUIGLEY") (collectively, the

"law professor-plaintiffs") are attorneys licensed to practice law in Louisiana who are employed as law professors or clinical law instructors, who administer, supervise, teach, and practice law in the clinical education programs operated by Tulane and Loyola law schools, and who are and have been injured by the Rule XX Amendments. They are "supervising lawyers" and "clinical program supervising lawyers" within the meaning of the Rule XX Amendments. The law professor-plaintiffs want to exercise their right to academic freedom, but are inhibited from doing so because their preferred methods of teaching are prohibited by the Rule XX Amendments. The law professor-plaintiffs also want to exercise their freedom to associate with students and potential clients for purposes of advocating and litigating to enforce the rights and remedies of the law school clinics' clients in the Louisiana state courts, but are inhibited from doing so under the Rule XX Amendments.

(a) Plaintiff KUEHN is a co-director of TELC and a Professor of Clinical Law at Tulane University Law School. Tulane is a private university and KUEHN's salary and the activities of TELC are paid for with non-state funds.

(b) Plaintiff GOBERT is a Visiting Professor of Clinical Law at Tulane University Law School and a co-director of TELC. GOBERT's salary and the activities of TELC are paid for with non-state funds.

(c) Plaintiff TEEL is a Clinical Instructor with TELC. TEEL's salary and the activities of TELC are paid for with non-state funds.

(d) Plaintiff JOHNSON is a Professor of Clinical Law at Tulane University Law School and the director of the Tulane Civil Litigation Clinic ("CLC"). JOHNSON's salary and the activities of CLC are paid for with non-state funds.

(e) Plaintiff QUIGLEY is an Associate Professor of Law at the Loyola University School of Law and the director of the Loyola Law Clinic ("LLC"). Loyola University is a private, religious university, and QUIGLEY's salary and the activities of LLC are paid for with non-state funds.

The Student-Plaintiffs

16. Plaintiffs TULANE ENVIRONMENTAL LAW SOCIETY ("ELS"), TULANE UNIVERSITY GRADUATE AND PROFESSIONAL STUDENT ASSOCIATION ("GAPSA"), INGA HAAGENSON CAUSEY ("CAUSEY"), CAROLYN DELIZIA ("DELIZIA"), and DANA HANAMAN ("HANAMAN") (collectively, the "student-plaintiffs") are student associations representing law student practitioners and eligible law students who are and have been injured, or whose members are or have been injured, by the Rule XX Amendments and individual "student practitioners" and "eligible law students" within the meaning of Rule XX Amendments. The student-plaintiffs are harmed because the Rule XX Amendments have eviscerated TELC, thereby infringing upon their academic freedom, interfering with their efforts to learn, interfering with their efforts to associate with others for purposes of legal advocacy under the auspices of the law school clinics, and undermining their post-graduate vocational opportunities.

Appendix D

(a) Plaintiff ELS is an organization of students at Tulane University Law School who share academic, legal, recreational, and general interest in the environment. ELS's membership has included TELC "student practitioners" and "eligible law students," as well as first- and second-year Tulane law students who have applied or intend to apply to participate in TELC as third-year law students. ELS seeks to promote educational opportunities at Tulane Law School and environmental consciousness on the Tulane campus and in the greater Louisiana community, as well as to promote an environmentally responsible agenda through education, outreach, scholarship, organizing, community service, and action.

(b) Plaintiff GAPSA is the elected organization representing Tulane University's graduate and professional students in the schools of Law, Medicine, Public Health, Engineering, Social Work, and Graduate Liberal Arts. GAPSA, as the governing entity for all graduate and professional students at Tulane, represents student voices on all matters of University and public policy affecting student interests. GAPSA promotes an open and free university where professors and students are encouraged to pursue the free exchange of ideas without government interference.

(c) Plaintiffs CAUSEY and DELIZIA are third-year students at Tulane University Law School. During the 1998-99 school year, they have been "student practitioners" and "eligible law students" in TELC. Both CAUSEY and DELIZIA enrolled in TELC because of

their desire to gain practical experience as lawyers by working for actual clients engaged in real-world disputes and because of their academic interest in environmental law.

(d) Plaintiff HANAMAN, a second-year student at Tulane University Law School during the 1998-99 school year, has applied to and been accepted as a "student practitioner" and "eligible law student" in TELC for the 1999-2000 school year. HANAMAN applied to TELC because of her desire to gain practical experience as a lawyer by working for actual clients engaged in real-world disputes and to further develop her academic interest in environmental law.

17. In addition to having standing in their own right, student-plaintiffs ELS and GAPSA have standing in this action because their members would otherwise have standing to sue in their own right, neither the claims asserted nor the relief requested requires the participation of individual members in the lawsuit, and the interests of that these student-plaintiffs seek to protect are germane to the organizations' purposes.

The Donor-Plaintiff

18. Plaintiff C. RUSSELL H. SHEARER ("SHEARER" or the "donor-plaintiff") has provided and wishes to continue to provide private funds to TELC. Plaintiff SHEARER earned an LLM degree in environmental law from the Tulane University Law School. SHEARER has financially contributed, and wishes to continue to financially contribute

to TELC because TELC provides excellent and important training, teaches young lawyers to be sensitive to the concerns of people and organizations unable to afford private counsel, and offers high quality advocacy enabling individuals and organizations to participate in the decisions affecting their lives in Louisiana, from which they otherwise would be excluded. SHEARER objects to the Rule XX Amendments because they prevent the funds he donates or would donate from being used for the purposes and to the full extent for which they were intended.

Defendant LOUISIANA SUPREME COURT

19. Defendant LOUISIANA SUPREME COURT is the highest court in the State of Louisiana. It consists of eight justices, seven of whom are elected pursuant to the Louisiana State Constitution, and an eighth justice who is currently sitting pursuant to a federal voting rights consent decree. Under its inherent powers and Articles II and V of the Constitution of the State of Louisiana of 1974, defendant has the authority to issue and enforce rules that are not unconstitutional and do not violate other federal and state laws.

FACTUAL ALLEGATIONS

20. In 1971, the LOUISIANA SUPREME COURT adopted Supreme Court Rule XX, entitled "Limited Participation of Law Students in Trial Work," in order to provide competent legal services "to clients unable to pay for such services and to encourage law schools to provide clinical instruction in trial work of varying kinds."

Appendix D

La. S. Ct. R. XX, § 1 (1971). Rule XX originally authorized eligible law students to "appear in any court or before any administrative tribunal in this state on behalf of the state, any political subdivision thereof, or any indigent person if the person on whose behalf he is appearing has indicated in writing his consent to that appearance and the supervising lawyer has also indicated in writing approval of that appearance." *Id.* § 3.

21. In 1988, the LOUISIANA SUPREME COURT amended Supreme Court Rule XX to clarify that eligible law students may also represent "community organizations."

22. Since 1971, TELC and the other law school clinics subject to Supreme Court Rule XX have provided competent and necessary legal advice to clients who otherwise would not have obtained representation.

23. In or about November, 1996, plaintiff ST. JAMES CITIZENS requested assistance from TELC in opposing construction of a polyvinyl chloride and ethylene dichloride production facility by Shintech, with the assistance of state and local government, in the town of Convent in St. James Parish. St. James Parish is located in the corridor between Baton Rouge and New Orleans along the Mississippi River, sometimes referred to as the "Chemical Corridor" or "Cancer Alley" because of the over 100 toxic facilities that populate the communities along this stretch of the River. Styrene, polyvinyl chloride, ethylene dichloride, and the other chemicals produced by these facilities have been linked to cancer, immune system disorders, and other illnesses. St. James Parish is one of the most polluted counties in the

United States: the Parish is ranked third in the state and seventeenth in the nation for the amount of toxic chemical releases into the air, land, and water.

24. Convent, Louisiana is a small, predominantly African-American, lower-income town located in St. James Parish. The area surrounding the proposed site for the Shintech plant is over 80% African-American with a median family income of just over $19,000. The proposed site is ringed by eleven major industrial sites and is in close proximity to three schools and hundreds of individual residences. The proposed facility would have released 1.5 tons of pollutants each year into the environment, including more than 100,000 pounds of vinyl chloride (a Class A human carcinogen), ethylene dichloride, caustic soda, and other pollutants. The greater Convent community lies within the "kill zone" for three of the four chemical facilities in St. James Parish (a facility's "kill zone" is the area with the greatest risk of harm in the event of an accident at the facility), and is also where 95% of the total reported toxic emissions for St. James Parish occurs.

25. Plaintiff ST. JAMES CITIZENS found it impossible to secure non-law school clinic counsel to represent it in its opposition to the Shintech facility. The Sierra Club Legal Defense Fund, the Natural Resources Defense Council, and the NAACP Legal Defense Fund, Inc., among others, all declined to represent ST. JAMES CITIZENS and other concerned groups (including plaintiffs LEAN, SCLC, NBREA, and LCU) who were also opposed to the Shintech facility. In October 1996, ST. JAMES CITIZENS asked TELC to represent them because they could not afford to

retain private counsel and were unable to obtain free representation from other sources. The case was approved by TELC's Advisory Board and in November, 1996, TELC agreed to represent ST. JAMES CITIZENS and other groups in opposing certain permit applications related to the Shintech facility.

26. Specifically, in December, 1996, and January, 1997, TELC appeared at public hearings on Shintech's environmental permits convened by the Louisiana Department of Environmental Quality ("LDEQ") and represented plaintiff ST. JAMES CITIZENS along with LEAN, SCLC, NBREA, LCU, and other groups in opposing the permits. In March and April, 1997, TELC filed objections to the LDEQ's proposed air pollution permits for Shintech with the United States Environmental Protection Agency ("EPA"), including objections that the State's permitting of Shintech would constitute environmental discrimination because St. James Parish housed a disproportionate amount of Louisiana's hazardous environmental facilities. On or about April 3, 1997, the EPA instructed the LDEQ to address the environmental justice objections raised in the comments prepared by TELC.

27. In April and May 1997, TELC filed a petition requesting that the EPA veto the air permits granted to Shintech by the State, arguing, *inter alia*, that the State's permits violated a Presidential Executive Order on environmental justice. Subsequently, TELC filed a petition with the EPA alleging that the State's permitting of the Shintech facility violated Title VI of the Civil Rights Act of 1964. Meanwhile, on or about May 22, 1997, TELC filed a

motion on behalf of certain community group clients alleging bias in the State's handling of the Shintech air permits and requested that the LDEQ be recused from making final permitting decisions.

28. TELC's advocacy in the Shintech case provoked intense criticism and retribution from political and business supporters of Shintech. Upon information and belief, on April 4, 1997, immediately after learning that the EPA had instructed the LDEQ to investigate environmental discrimination claims with respect to the Shintech permits, the Governor of Louisiana, Murphy J. "Mike" Foster, called the President of Tulane University, Eamon Kelly, to complain about TELC's involvement in the Shintech case and stated that TELC was acting as an anti-economic development force.

29. Upon information and belief, in May 1997, Governor Foster told business leaders at a meeting of the New Orleans Business Council ("Business Council") that they could assist him by exerting their economic and political influence to control the activities of TELC. Upon information and belief, Foster advised the business leaders to reconsider and withhold their financial support for Tulane University unless TELC was "brought under control." Upon information and belief, at that same meeting business leaders with ties to Shintech advised the Business Council to send a letter to the LOUISIANA SUPREME COURT demanding that it restrict the legal advocacy activities of TELC.

30. Beginning in July, 1997, the Complainants demanded that the LOUISIANA SUPREME COURT

investigate the practices of TELC and amend Supreme Court Rule XX to suppress TELC's ability to advocate the views of groups such as ST. JAMES CITIZENS and the other client-plaintiffs. The Complainants urged the LOUISIANA SUPREME COURT to subject TELC to stricter regulation because TELC's environmental advocacy was allegedly having a negative impact on business in Louisiana and was contrary to business positions.

31. On or about July 8, 1997, the LOUISIANA SUPREME COURT received a letter from The Chamber/ New Orleans and the River Region ("The Chamber"), a chamber of commerce organization dedicated to the growth and development of business in the New Orleans region. The Chamber alleged that Supreme Court Rule XX was "being interpreted and used by TELC to legally empower young individuals not member [sic] of the Bar to push and impose the social views of the faculty and students in the courts of the State of Louisiana as well as before Administrative Bureaus." The Chamber further alleged that "the individual faculty and students' legal views are in direct conflict with business positions," and asked the LOUISIANA SUPREME COURT "to investigate the cases, positions and stands taken by the Tulane Law Clinic under the authority of [Supreme Court Rule XX]."

32. On July 11, 1997, in an interview on a statewide Louisiana Public Broadcasting program, Governor Foster criticized TELC as "a law unto themselves. They have decided that they will decide who comes to Louisiana and decide under what rules. . . . This group decides they're going to be the law themselves. It's almost like they're the

vigilantes out there doing this on their own. And I don't think it's right. And I'm gonna tell you, I'm going to encourage anybody from Tulane to do what they can to put a stop to it."

33. On or about July 16, 1997, the Business Council wrote to the LOUISIANA SUPREME COURT, proclaiming that it represents "the largest business entities in [the] region" and demanding that defendant investigate the use of the student practice rule by TELC. The Business Council advised the court that "[w]e gather that the court rule gives the faculty and students of Tulane an unrestricted right to use the court rules to fight, harass and interfere with Louisiana's interest to attract new business. . . . We are confident the court never intended for these rules to be a source of anti-business clinics under the auspices of a university. We would appreciate your investigating [the] current status of the [TELC], and respectfully request the rules be corrected to cease these practices."

34. On July 23, 1997, Kim Sport, a Deputy Judicial Administrator for the LOUISIANA SUPREME COURT, contacted Governor Foster's office to obtain information regarding TELC. Since June, 1995, Ms. Sport also held a position with The Chamber, one of the Complainants, as the Chair of its West Bank Council. Ms. Sport has acknowledged that she was referred by the Governor's office to the Louisiana Department of Economic Development ("LDED"), which then sent her by email a listing containing "promised" phone numbers that identified individuals who had been involved in litigation against TELC.

35. On or about August, 8, 1997, Kevin Reilly, the Secretary of LDED, and Governor Foster's liaison on the

Shintech project, sent a letter under LDED letterhead to Tulane University President Eamon Kelly, with copies to the Tulane University Board of Trustees and to all the deans of Tulane University, accusing TELC of conducting "environmental-related barratry" and "legalistic guerrilla attacks against environmentally-responsible industry and the Department of Environmental Quality" to the purported detriment of the State's economic development. Reilly wrote that TELC was "irresponsible," "reckless," and "corrupting the legal system," and urged that "Tulane request the Louisiana Supreme Court to review the activities of TELC to determine if the Clinic has overstepped the charter the Court originally gave it."

36. On this and other occasions, Secretary Reilly used his State office to wage a campaign of political pressure and public criticism against TELC because of its representation of environmental groups generally, and its representation of concerned citizens opposed to the Shintech plant in particular. Upon information and belief, Reilly publicly attacked TELC for providing representation to the indigent community groups opposed to Shintech, and complained that TELC's actions were "corrupting the legal system" and having a "chilling effect" on Louisiana's economy. Reilly publicly vilified TELC as "environmental fascists" who used "brown-shirt tactics."

37. On or about September 9, 1997, the President of the Louisiana Association of Business and Industry ("LABI") sent a letter to the LOUISIANA SUPREME COURT and a Proposal to Amend and Enforce Rule XX ("LABI Proposal"). LABI alleged that "Louisiana business concerns have borne

the heavy burden of often misguided challenges to their environmental permits or other actions" through the actions of TELC, and "suggested that the student practice of environmental law be regulated more closely and that the students, supervisors, clinics, and law schools be held accountable for their actions."

38. LABI alleged, *inter alia*, that TELC's "obstructionist practices continue to be unnecessarily expensive and burdensome to state and federal regulators, the courts, and permit applicants" and that TELC's "abuse of the courts and the media to pursue its agenda has likewise been damaging to the state. Because it acts freely to discredit industry in Louisiana, propagates technical misinformation, and attacks governmental decisions within the state (usually on procedure, not merit), it has negatively impacted the state."

39. None of LABI's allegations concerning ethical violations or abuses of Supreme Court Rule XX by TELC had any basis in fact. Nevertheless, asserting that TELC "has been bad for business in Louisiana" and that "abuses of Rule XX have cost Louisiana industry millions of dollars," LABI advised defendant that "[a] substantial portion of these problems can be addressed simply by amending and enforcing Rule XX to subject student attorneys and law school clinics to the same standards to which other practicing attorneys are held." LABI then proposed a series of restrictive amendments to Supreme Court Rule XX intended to curtail the practices of TELC, including a prohibition "on client solicitation and/or the use of so-called outreach coordinators" by clinics. LABI's proposed restrictions formed the basis of the restrictive Rule XX Amendments adopted by defendant

even though defendant's own investigation of TELC and the other law school clinics uncovered no evidence whatsoever to substantiate any of the ethical violations or breaches of Supreme Court Rule XX alleged by LABI, and even though student attorneys and law school clinics already were subject to the same ethics standards to which practicing attorneys in Louisiana are held.

40. On or about November 6, 1997, the President of The Chamber/ Southwest Louisiana ("The SWLA Chamber") wrote to Chief Justice Calogero, noting that the LOUISIANA SUPREME COURT's review of Rule XX had been "prompted in part by letters sent by the New Orleans Chamber of Commerce, the New Orleans Business Council and the Louisiana Association of Business and Industry to Chief Justice Calogero complaining about the Tulane Environmental Law Clinic's" activities. Seeking "to add its voice" to those of the other business interests demanding an investigation into TELC's activities, the SWLA Chamber alleged that TELC's "activities have had an adverse effect on economic growth and development not only in the Baton Rouge and New Orleans areas but also in Southwest Louisiana."

41. In reaction to political pressure and the demands from the Complainants, the LOUISIANA SUPREME COURT began an official "investigation" of TELC and the other Louisiana law school clinics. On September 25, 1997, Chief Justice Calogero sent a letter to the deans of Louisiana's law schools, informing them that the LOUISIANA SUPREME COURT had received complaints about TELC, and that Tim Averill and Kim Sport, both of

whom were Deputy Judicial Administrators for the LOUISIANA SUPREME COURT, would be conducting a review of the State's law school clinics. The Chief Justice's letter was followed by a letter from Mr. Averill, dated October 8, 1997, further advising the deans that he and Ms. Sport would be visiting the law schools to question them about the operation of the clinical programs. As noted above, Ms. Sport at the time had already initiated an inquiry into the law school clinics, and also held an official position with The Chamber, one of the Complainants.

42. Before visiting the law schools, Mr. Averill requested written information about the clinics. The deans of Tulane, Loyola, and Southern supplied the LOUISIANA SUPREME COURT with the requested information and provided a detailed factual refutation of all of the allegations of ethical misconduct and abuses asserted by the Complainants.

43. In November, 1997, LOUISIANA SUPREME COURT "investigators," Deputy Averill and Sandra Vujnovich, visited the three law schools' clinics. The investigators spent less than a day at Loyola and Southern, but devoted two exhaustive days at Tulane. The investigators conducted separate and lengthy meetings with TELC students and staff, but met for a comparatively short period of time with the directors of Tulane's other law school clinics.

44. In April, 1998, the librarian of the LOUISIANA SUPREME COURT surveyed law schools around the country seeking information concerning the scope of their clinics' practices. She inquired as to whether the schools'

environmental or other clinics ever represent community organizations, various interest groups, or nonprofit corporations, whether they represent national organizations or local affiliates thereof, and the authority pursuant to which students in their states are permitted to practice. Upon information and belief, the survey revealed that TELC's practices in representing nonprofit community organizations that could not afford private counsel were entirely consistent with the practices of law school clinics around the country.

45. The LOUISIANA SUPREME COURT has never made public either the results of its investigation of the Louisiana law school clinics or its librarian's national survey. Upon information and belief, the LOUISIANA SUPREME COURT has prepared a report compiling the results of its investigation. Although plaintiffs have never seen the report and have never been informed of its contents, Justice Johnson's published dissent to the March 22, 1999 version of the Rule XX Amendments confirmed that the investigation uncovered absolutely no wrongdoing on the part of the clinics: "Even though the complaints from business interests were directed specifically at Tulane Environmental Law Clinic, we decided to do a survey of law clinics at Tulane, Loyola, and Southern University law schools. An exhaustive review of all Louisiana law clinics *failed to uncover any violations* of the Law Student Practice Rule." (Emphasis added.)

46. Moreover, in a public debate at Tulane University during his 1998 campaign for reelection, Chief Justice Calogero admitted that the LOUISIANA SUPREME COURT had found no evidence of any ethical violation by

any law school clinic and admitted that defendant had not identified a single client represented by the law school clinics that was capable of affording private legal counsel.

47. Despite the fact that the investigation had uncovered no evidence of wrongdoing nor any indication that the clinic had ever represented any client able to afford private counsel, the LOUISIANA SUPREME COURT amended Rule XX on June 17, 1998 (the "June 17, 1998 Amendments"). In relevant part, the June 17, 1998 Amendments: (i) prevented the law school clinics from representing any individual unless the individual was sufficiently poor to meet the poverty level established by the federal Legal Services Corporation (LSC); (ii) prevented the law school clinics from representing community organizations unless the organization could certify that 75 percent of its members' incomes were below the poverty level established by the LSC; (iii) prevented the law school clinics from representing community organizations that were affiliated with national organizations; and (iv) prohibited students from representing any individual or community group if any person associated with the law school clinic had initiated in-person contact with the client or if the law school clinic had provided assistance in forming, creating, or incorporating the community group that desired representation. The June 17, 1998 Amendments became effective on July 1, 1998, and except for the grandfather clause, had an immediate and profound chilling effect on the ability of the clinics to operate and on the ability of former and potential new clients to obtain free representation from the clinics.

48. Shortly thereafter, on June 26, 1998, the deans of Tulane and Loyola law schools sent a joint letter to the

LOUISIANA SUPREME COURT requesting reconsideration and stay of the 1998 Amendments. On June 30, 1998, the LOUISIANA SUPREME COURT amended the June 17, 1998 Amendments, reducing from 75 to 51 the percentage of a community organization's membership whose income must fall below the LSC poverty guidelines, and suspending the prohibition against client "solicitation."

49. On March 22, 1999, the LOUISIANA SUPREME COURT again amended Rule XX (the "Rule XX Amendments"). These final amendments, which become effective as of April 15, 1999, provide in relevant part:

> *Section 4*: Standard for Determining Eligibility for Representation. Law School clinical program staff and student practitioners who appear in a representative capacity pursuant to this rule may represent any individual or family unit whose annual income does not exceed 200% of the federal poverty guidelines established by the Department of Heath and Human Services. These guidelines need not be applied when the client is court-appointed or court-referred and the appointing or referring court has reviewed the economic condition of the client and has determined that the client is indigent.
>
> *Section 5*: Representation of Indigent Community Organizations. Any indigent community organization that wishes to obtain representation pursuant to this rule must certify in writing to the inability to pay for legal services. The written

certification shall be subject to inspection by the Supreme Court of Louisiana.

Law school clinical program staff and student practitioners who appear in a representative capacity pursuant to this rule may represent any indigent community organization provided at least 51 percent of the organization's members are eligible for legal assistance pursuant to Section 4 of this rule. The indigent community organization shall also provide information to clinic staff which shows that the organization lacks, and has no practical means of obtaining, funds to retain private counsel.

Section 10: Lawyer staffpersons of law school clinical programs and certified student practitioners shall adhere to the rules prohibiting solicitation of cases or clients. In addition, no student practitioner shall appear in a representative capacity pursuant to this rule if any clinical program supervising lawyer, staffperson, or student practitioner initiated in-person contact, or contact by mail, telephone or other communications medium, with an indigent person or other indigent community organization for the purpose of representing the contacted person or organization.

50. Ms. Sport, who participated in the investigation of the clinics in her role as LOUISIANA SUPREME COURT employee and who also held an official position with

Complainant The Chamber, is currently still employed by defendant and has been the defendant's spokesperson on the Rule XX Amendments. As recently as January 29, 1999, Ms. Sport was identified in The Times-Picayune as continuing to hold a position with The Chamber as its Regional Council Leader for Community Development. The article explained that the job of "Regional Council Leaders" is to "help [The Chamber] in its push to unify business in the metro area."

Impact of the Rule XX Amendments

51. Upon information and belief, the Rule XX Amendments are the most restrictive rules governing student clinical legal education in the nation. Upon information and belief, no other state requires individual law school clinic clients to prove eligibility based on federal poverty standards. In the small minority of states that limit student practice to "indigent clients," the determination of indigency is left to the law schools. Upon information and belief, no other state requires that at least 51 percent of an organization's individual members meet a predetermined indigency standard in order to qualify for law school clinic representation. No other state bars student practitioners from representing clients simply because the student or other law school clinical staff member initiated contact with the client.

52. Indeed, upon information and belief, in law schools in the other 49 states and the District of Columbia, students are taught that it is lawful and proper for public interest lawyers to reach out to potential clients in need of free legal representation where the lawyer's primary motivation is not pecuniary. Louisiana's Rule of Professional Conduct 7.2(a)

only prohibits attorneys from contacting a potential client when "a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." Law school clinic faculty, supervising attorneys, and student practitioners do not have any motive of pecuniary gain in connection with client outreach activities or client representation.

53. Defendant intentionally promulgated the Rule XX Amendments for the impermissible purpose of penalizing, suppressing, and discriminating against the advocacy of TELC and the views of its clients in seeking to enforce public laws and vindicate public rights to protect, restore, and preserve the environment and public health in Louisiana. Defendant cannot disguise the fact that the Rule XX Amendments are a mere facade for viewpoint discrimination. As Justice Johnson properly stated in her dissent to the Rule XX Amendments, the LOUISIANA SUPREME COURT "should not curtail a program that teaches advocacy while giving previously unrepresented groups and individuals access to the judicial system in order to satisfy critics who are discomforted by successful advocacy."

Impact on Client-Plaintiffs

54. The Rule XX Amendments deliver the Complainants intended effect. They make it exceedingly difficult for working families and community organizations to obtain legal representation. In November, 1998, Chief Justice Calogero admitted he was unaware of any community organization able to qualify for law clinic assistance under the June 17, and June 30, 1998 Rule XX Amendments.

55. Client-plaintiffs SCLC, ST. JAMES CITIZENS, CLEAN, HOLY CROSS, LEAN, LOUISIANA ACORN, NBREA, and LCU are represented and/or have been represented by TELC in several matters of crucial importance to those organizations and their members. Client-plaintiffs FISHERMEN'S ASSOCIATION and RESIDENTS COUNCIL are represented and/or have been represented by LLC in several matters of crucial importance to those organizations and their members. Several of the member organizations comprising client-plaintiff LCU are represented and/or have been represented by TELC on matters of critical importance to LCU and its members. The expert advocacy of the law school clinics has enabled the client-plaintiffs to focus their efforts to advance their interests and those of their members, and to achieve crucial goals in areas such as environmental protection, civil rights, public health, and economic justice.

56. However, the Rule XX Amendments prevent the client-plaintiffs from obtaining legal representation from law school clinics in new matters, thus undermining the ability of the client-plaintiffs and their members to advance their interests, protect their rights, and participate in regulatory and judicial processes.

I. *The Compelled Disclosure Provisions*

57. By focusing on the income of individual members of a community organization rather than on the income of the organization, the Rule XX Amendments prevent needy nonprofit community organizations from obtaining the services of law clinics, and also severely chill participation

in such organizations. Under the Rule XX Amendments, those who wish to join client-plaintiffs and other organizations in order to share ideas, to collaborate with others from diverse backgrounds in addressing community concerns, to defend the civil and political rights of members, or to protect the environment and public health, are suddenly required to disclose their personal finances as a condition of membership in order for the organization to even be considered for law school clinic representation. The Rule XX Amendments harm organizations because members will resign, and new members will be reluctant to join, if membership requires such disclosure.

58. In addition to basic concerns about disclosing private information, members of organizations are concerned that through such compelled disclosure, private information could become available to government agencies or others, rendering members vulnerable to economic and other forms of retaliation. The threat of disclosure has a chilling effect on members' willingness to join organizations and remain as members. Additionally, for the client-plaintiffs that have substantial numbers of African-American members (e.g., SCLC, RESIDENTS COUNCIL, FISHERMEN'S ASSOCIATION, NBREA, ST. JAMES CITIZENS), the chilling effect on participation is especially strong, in light of the history of harassment of people engaged in advocacy efforts during the civil rights movement.

59. It is no answer to suggest that individual members who could meet the Rule XX Amendments' standard of indigency should pursue the organization's agenda by qualifying individually for law school clinic representation.

The loss of privacy inherent in proceeding as an individual, rather than as a member of an organization, exposes the individual to tremendous risk, including economic and other forms of retaliation. For example, many members of client-plaintiff ST. JAMES CITIZENS have friends or relatives who work for government or local industry. If an individual member served as a plaintiff in an environmental matter, he or she would be acutely vulnerable to economic retaliation. Thus, client-plaintiffs' individual members are reluctant to serve in such a role. A major reason to join community organizations is to gain the strength of the group and the opportunity to engage in organized advocacy without the risks of individual advocacy. And, as noted above, the opportunity to participate within organizations is very important for African-Americans in particular, due to fears of harassment, intimidation, or other hostility stemming from experiences of similar harassment during the civil rights movement.

60. Even if individual indigent members of client-plaintiffs were willing and otherwise able to proceed with law school clinic representation, such individuals would also confront filing fees and other costs that, for a person who is genuinely indigent, present a substantial additional barrier to acting individually.

II. *The "51 Percent Rule"*

61. The "51 percent rule" has another pernicious effect. It creates an incentive for organizations to separate into two subgroups — those who are truly desperately poor, and all others. While the group comprised of the desperately poor

could then qualify for clinic representation under the Rule XX Amendments, the harm to the individuals and the organization is plain. The Rule XX Amendments isolate the poorest Louisianans, and deny them the opportunities to associate with others who are less poor; the Rule XX Amendments thus also deny all members the opportunity to mix freely with others from diverse backgrounds in the pursuit of common goals.

62. The Rule XX Amendments also harm the client-plaintiffs because, by encouraging groups to divide into "poor" and "less poor" subgroups, they stigmatize certain members of client-plaintiffs, making group action more difficult.

63. Similarly, the Rule XX Amendments harm the client-plaintiffs insofar as they force organizations to rely on a single indigent individual to establish eligibility for law school clinic representation and advance the needs of the organization. The organization is ill-served by entrusting to a single indigent individual complete responsibility and authority to carry litigation forward alone.

64. The Rule XX Amendments further harm the client-plaintiffs by imposing the excessive burden of verifying, on an ongoing basis, their members' incomes. The client-plaintiffs lack the administrative resources to comply with Section 5 of the Rule XX Amendments. Because the "51 percent rule" requires ongoing compliance with the indigency standard, organizations must also require ongoing disclosure from their members. The client-plaintiffs are not able to track the inevitable changes in members' incomes

that result from employment promotions, raises, inheritances, loss of employment, absence from employment due to illness, and other common occurrences affecting income. The difficulty of verifying members' incomes on an ongoing basis exposes the law professor-plaintiffs and student-plaintiffs to the risk of sanctions, regardless of their good-faith efforts to comply with the Rule XX Amendments, and has and will continue to discourage law school clinics from representing client-plaintiffs.

65. For some plaintiffs, the burden is particularly acute. Most client-plaintiffs, including SCLC, ST. JAMES CITIZENS, HOLY CROSS, FISHERMEN'S ASSOCIATION, and NBREA do not have any staff persons at all, and thus would be unable to track members' incomes.

66. Client-plaintiff LEAN has over 1,000 individual members and 87 organization members. Tracking the individual members' incomes on an on-going basis is an administrative impossibility for LEAN, and insofar as the Rule XX Amendments may require LEAN to canvass all of the unincorporated community organizations or nonprofit corporations which comprise part of its membership and to verify the income of their individual members, the task becomes even more administratively burdensome.

67. It would be impossible, too, for RESIDENTS COUNCIL to keep current records of all of its members' incomes. At present, the St. Thomas Housing Development has approximately 750 occupied family units. Every resident in every unit who appears on the lease and is over 18 years old is considered a member of the organization. There are

no dues or other membership requirements. In addition, the St. Thomas Housing Development experiences frequent tenant turnover. Thus, at any given time, RESIDENTS COUNCIL has well over 1,000 members; yet RESIDENTS COUNCIL cannot determine with certainty its complete membership roster. It would be impossible for RESIDENTS COUNCIL, which has no permanent staff and no budget, to devote the resources necessary to catalogue and verify the incomes for each member of the organization on an ongoing basis.

68. By conditioning the client-plaintiffs' eligibility for law school clinic representation on a rigid standard of member indigency, Section 5 of the Rule XX Amendments denies law school clinic representation to client-plaintiffs solely because some of their members may have incomes slightly exceeding the cap, even though their limited funds may be dedicated to such matters as medical bills, educational expenses, or repayment of debts. Furthermore, by conditioning the client-plaintiffs' eligibility on the incomes of their members, rather than on the resources of the client-plaintiff organizations, Section 5 of the Rule XX Amendments denies law school clinic representation to organizations that actually lack the funds to retain and pay for private attorneys.

69. The "51 percent rule" is also unconstitutionally vague and overbroad. The Rule XX Amendments do not specify what proof of income must be submitted to certify eligibility for law clinic representation. In addition, the Rule XX Amendments do not specify how frequently client-plaintiffs must verify their members' incomes in order to

satisfy the "51 percent rule." The client-plaintiffs are therefore unable to assure themselves that they qualify for law school clinic representation under Section 5 of the Rule XX Amendments.

70. For example, the "51 percent rule" is nonsensical and contrary to law when applied to client-plaintiffs LEAN and LCU, nonprofit organizations whose members include nonprofit corporations, unincorporated membership organizations, as well as individual members. Under Section 5 of the Rule XX Amendments, 51 percent of an organization's "members" must have incomes that meet the standard of indigency contained in Section 4. However, there are no "federal poverty guidelines" for nonprofit corporations or unincorporated membership organizations. Therefore, LEAN and LCU are unable to comply with the certification and income verification requirements of Section 5 of the Rule XX Amendments because the Rule XX Amendments do not contain appropriate income measures by which LEAN and LCU may determine their eligibility for law school clinic representation.

71. Plaintiffs' adversaries are able to exploit the ambiguity of Section 5 of the Rule XX Amendments not merely to disqualify law school clinical representation in particular cases, but to chill law school clinics and clients into silence prospectively. The vague and overbroad nature of the Rule XX Amendments exposes plaintiffs to the threat of sanctions. If a law school clinic client is found ineligible under the Rule XX Amendments, the law professor-plaintiffs could be charged with misconduct, and the student-plaintiffs could be charged with engaging in the unauthorized practice of law.

72. Already, the environmental defense bar has asserted that attorneys in Louisiana have an ethical obligation to police law school clinic students and faculty and to report violations of the Rule XX Amendments to the bar. (*See* Anne J. Crochet, *Supreme Court Changes Rule Governing Law School Clinics*, 46 La. Bar J. 239, 239-41 (1998)). The fear of such attacks, arising out of the vague and overbroad nature of the Rule XX Amendments, has deterred the law professor-plaintiffs and student-plaintiffs from representing new clients as well as representing former or current clients on new matters. This has deprived client-plaintiffs of access to the free, experienced legal representation provided by the law school clinics.

III. *The Gag Rule*

73. Section 10 of the Rule XX Amendments, barring law student practitioners from representing any client contacted by law school clinic faculty, lawyers, students, or staff for the purpose of providing clinic representation, prevents client-plaintiffs from learning about threats to their rights and the availability of remedies. Section 10 of the Rule XX Amendments further prevents client-plaintiffs from securing free law school clinic representation, in order to take action to defend those rights. Section 10 of the Rule XX Amendments denies client-plaintiffs similar information in the future, because law professor-plaintiffs, student-plaintiffs, and law school clinics as a whole are chilled from notifying client-plaintiffs about current threats to their rights.

74. Under the vague and overbroad Rule XX Amendments, even the simple actions of distributing leaflets

or posting signs that educate the public about the law or that mention the opportunity to obtain law school clinic representation, expose clinic lawyers and students to the threat of sanctions if they are involved in such educational efforts.

75. The ban on "solicitation" contained in the Rule XX Amendments applies to every communications medium, and applies even if the purpose of the leaflet or poster is nothing more than to inform potential clients who are desperately in need of counsel that the law-school clinics can respond to that need.

IV. *The Ongoing Harm to the Client-Plaintiffs*

76. The Rule XX Amendments have thus deprived client-plaintiffs of law school clinic representation, and no alternatives are available to client-plaintiffs.

77. Those client-plaintiffs for whom environmental advocacy is a pressing concern do not have adequate resources to retain private counsel to handle complicated and expensive environmental litigation.

78. Even if they could afford to retain private counsel, the client-plaintiffs are not aware of available counsel capable of handling such complicated matters, especially in the environmental area. Indeed, due to conflicts arising out of the representation of other clients, attorney members of the private bar would be unable to handle such matters for the client-plaintiffs even if the organization possessed the substantial funds needed to retain such counsel.

79. In addition, the client-plaintiffs are not aware of available counsel capable of handling such complicated matters, especially in the area of environmental litigation, who are willing to work *pro bono*.

80. As associations, the client-plaintiffs are unable to represent themselves in court *pro se*. Rather, they must appear by licensed attorneys.

81. The client-plaintiffs regularly encounter threats to their environment, public health, civil rights, and economic well-being, for which they require ongoing legal assistance, ranging from full-scale litigation on major matters, to many smaller instances of representation. They will certainly face such threats in the future. The client-plaintiffs require legal assistance and representation in order to assess their members' concerns and determine appropriate remedies. The client-plaintiffs have relied on TELC or LLC to resolve problems, often without resort to litigation.

82. The client-plaintiffs currently find themselves without representation on several matters. For example, ST. JAMES CITIZENS is opposed to CS Metals, Inc.'s plan to build a metal recovery facility in St. James Parish on the ground that the Parish is already overburdened by pollution from industrial projects. ST. JAMES CITIZENS asked TELC to represent it in this matter, and TELC has declined to provide representation because ST. JAMES CITIZENS has been unable to demonstrate that 51 percent of its members satisfy the income guidelines contained in the Rule XX Amendments.

83. ST. JAMES CITIZENS also needs legal representation in connection with its opposition to Kaiser Aluminum and Chemical Co.'s petition to the LDEQ to increase the level of its polyvinyl chloride emissions by 150 percent. TELC cannot represent ST. JAMES CITIZENS in this matter because the organization cannot certify that 51 percent of its members satisfy the income guidelines for representation of individuals.

84. CLEAN requires legal representation in connection with high air pollution levels in the residential neighborhood of Carlyss in Calcasieu Parish. Air tests in that neighborhood have revealed benzene levels over two-hundred times the State ambient air quality limit. The high levels of benzene, a known human carcinogen, are a real and immediate threat to the health and safety of the Lake Charles community. Yet none of the local chemical facilities has reported a release that could explain such high levels in this residential neighborhood. CLEAN needs legal counsel to represent it in this matter, both to educate CLEAN about its rights and to pursue whatever legal recourse is available. However, as a result of the Rule XX Amendments, CLEAN finds itself without legal counsel.

85. LEAN, SCLC, and other client-plaintiffs oppose plans to ship 3.4 million gallons of napalm from the Fallbrook Naval Weapons Station in California to Louisiana. Upon arrival in Louisiana, the napalm is to be burned at the Rhodia, Inc. plant near Southern University. LEAN has asked TELC to represent it and the other groups in this matter, but TELC has indicated to LEAN that it could not undertake representation for the sole reason that LEAN could not certify

that it satisfied the requirements of Section 5 of the Rule XX Amendments. Absent the impediment established by the Rule XX Amendments, TELC would have presented this case to its Legal Advisory Board for approval.

86. In another matter, LEAN opposes plans to reopen a long dormant electrical generating facility in Monroe, Louisiana. TELC has informed LEAN member group, Citizens for Clean Air and Water, that TELC cannot represent them in this matter because of the group's inability to certify that it satisfies the requirements of Section 5 of the Rule XX Amendments. LEAN has not asked TELC to represent it in this matter because TELC has already indicated that the Rule XX Amendments prevent TELC from representing LEAN in new matters because of LEAN's inability to certify that it satisfies the "51 percent rule."

87. LOUISIANA ACORN requires legal assistance to redress its members' legal rights in connection with plans to build a concrete crushing plant on Dakin Street in a residential neighborhood in Jefferson Parish. LOUISIANA ACORN also requires legal support in its efforts to petition for better regulations governing lead pollution. However, LOUISIANA ACORN is unable to qualify for representation by a law school clinic because of its inability to comply with the 51 percent rule.

88. NBREA would like East Baton Rouge Parish to reconsider the current zoning status of certain predominantly African-American communities in the Parish for heavy industrial development. However, as a result of the Rule XX Amendments, NBREA finds itself without access to legal representation of the clinics.

Appendix D

89. These are just some examples of how the Rule XX Amendments have impermissibly infringed the constitutional rights of the client-plaintiffs since they were first promulgated in June, 1998.

Impact on Law Professor-Plaintiffs

I. *Plaintiffs KUEHN, GOBERT, and TEEL*

90. The Rule XX Amendments impermissibly restrict the academic freedom of plaintiffs KUEHN, GOBERT, and TEEL and also violate their associational and speech rights. As supervising lawyers and clinical program supervising lawyers at Tulane University Law School, KUEHN, GOBERT, and TEEL are responsible for overseeing and coordinating the work of TELC, including selecting cases and clients and supervising student attorneys in representing community organizations and individuals before state courts and agencies. In connection with TELC, plaintiffs KUEHN, GOBERT, and TEEL have only represented clients who cannot afford to retain private attorneys.

91. Prior to the enactment of the Rule XX Amendments, KUEHN, GOBERT, and TEEL determined whether TELC should accept a particular client and case based on several factors, including the pedagogic value of the case and its value to the public interest.

92. The Rule XX Amendments have impermissibly restricted the academic freedom of KUEHN, GOBERT, and TEEL by preventing them from utilizing non-state funds to provide representation to clients whose cases afford the best

teaching and learning opportunities. Organizations have been unable to certify to TELC that they meet the income restrictions imposed by the Rule XX Amendments. Thus, TELC can no longer represent community organizations in new matters. Because the Rule XX Amendments effectively bar TELC from representing community organizations and obtaining new clients, the Rule XX Amendments have harmed KUEHN, GOBERT, and TEEL by preventing them from teaching clinical law students how to develop and handle clients' cases.

93. The Rule XX Amendments require KUEHN, GOBERT, and TEEL to deny TELC representation to potential clients even though the activities of TELC, as well as the salaries of KUEHN, GOBERT, and TEEL, are not funded by the State of Louisiana and even though those potential clients have no opportunity to obtain other private counsel.

94. Because the Rule XX Amendments are vague and overbroad, KUEHN, GOBERT, and TEEL have been reluctant to determine that any potential client qualifies for representation. KUEHN, GOBERT, and TEEL fear that they, their students, and the rest of the TELC staff may become the targets of retaliatory sanctions, motions, and other claims of professional misconduct — regardless of their good-faith efforts to comply with the new restrictions — because the Rule XX Amendments are so ambiguous and can be construed in different ways. This fear of retaliation by the defense bar has chilled the speech of KUEHN, GOBERT, and TEEL, infringing their First Amendment rights of expression and association.

95. Section 10 of the Rule XX Amendments impedes plaintiffs KUEHN, GOBERT, and TEEL in their efforts to initiate contact with organizations for the purpose of informing them of issues affecting their health and welfare and offering TELC's free legal services. Prior to the enactment of Section 10, TELC staff had from time to time engaged in such outreach as a means of informing citizens of their rights and the legal advocacy services provided by TELC. Because of the Rule XX Amendments, they can no longer offer TELC's legal assistance, thus penalizing the TELC supervising attorneys, staff, students, and their community organization clients for engaging in protected First Amendment activity. Section 10 thus intrudes upon the academic freedom of KUEHN, GOBERT, and TEEL by further limiting their selection of cases and activities for TELC's curriculum, and impairs their rights of speech and association by chilling them from associating with, advising, and representing community organizations.

II. *Plaintiff JOHNSON*

96. The Rule XX Amendments impermissibly restrict the academic freedom of plaintiff JOHNSON and also infringe her rights of free speech and association. As Director of CLC and a Professor of Clinical Law at Tulane University, JOHNSON is responsible for overseeing CLC, including selecting cases and clients and supervising student practitioners before state courts and agencies. In connection with CLC, JOHNSON has only represented clients who cannot afford to retain private counsel.

97. Although CLC has represented community organizations, CLC's state court docket consists primarily

of the representation of individuals in family law matters. Prior to the enactment of the Rule XX Amendments, JOHNSON, together with her colleagues at CLC, determined whether CLC should accept a particular client based on several factors, including the pedagogical value of the case, its value to the public interest, and the client's inability to afford private counsel. The Rule XX Amendments infringe JOHNSON's academic freedom by preventing JOHNSON and CLC from utilizing non-state funds to provide representation to clients whose cases afford the best teaching opportunities but who do not meet the income requirements of Sections 4 and 5 of the Rule XX Amendments.

98. JOHNSON and her colleagues at CLC currently intend to expand the CLC's legal work into other substantive areas of the law. In particular, they want CLC to begin representing communities that are suffering from blighted housing. JOHNSON and her colleagues at CLC believe this casework will provide an excellent educational opportunity for student practitioners, and Tulane clinical law students have expressed an interest in learning how to represent community organizations that seek to improve housing conditions.

99. In pursuing this work, CLC will need to represent increased numbers of community organizations. However, because the Rule XX Amendments make it impossible to provide representation to community organizations, Johnson and her colleagues at CLC are unable to engage in this housing work.

100. The Rule XX Amendments thereby infringe JOHNSON's academic freedom by preventing JOHNSON

and other CLC instructors from teaching clinical law students how to develop and handle those cases that CLC deems to be most pedagogically appropriate.

101. Section 10 of the Rule XX Amendments violates JOHNSON's right to free speech and association because it impedes JOHNSON's efforts to initiate contact with individuals and organizations for the purpose of educating them about their legal rights and remedies and informing them about the legal services offered by CLC. CLC does not regularly conduct such client outreach, but from time to time, and prior to the enactment of Section 10, JOHNSON had engaged in client outreach as an effective and important means for obtaining clinical clients and as a vehicle for associating with community groups. Because of the Rule XX Amendments, however, she can no longer offer them CLC's legal assistance, thus penalizing JOHNSON, as well as the individual and community organization clients, for engaging in protected First Amendment activity. Section 10 intrudes upon JOHNSON's right to academic freedom by further limiting her selection of cases and activities for CLC's curriculum, and impairs her right of free association and speech by chilling her from associating with, and providing legal advice to, individuals and community organizations.

III. *Plaintiff QUIGLEY*

102. The Rule XX Amendments impermissibly restrict the academic freedom of plaintiff QUIGLEY. As Director of LLC and as an Associate Professor of Law at Loyola University, QUIGLEY is responsible for overseeing all aspects of LLC, including selecting cases and clients and

supervising student attorneys in representing community organizations and individuals before state courts and agencies. In connection with LLC, QUIGLEY has only represented clients who cannot afford to retain private attorneys.

103. Prior to the enactment of the Rule XX Amendments, QUIGLEY, in concert with other Loyola clinic professors, determined whether LLC should accept a particular client and case based on a number of pedagogically relevant factors, including where the case might be brought, the substantive issues in the case, the interests of the students, the interests of the faculty, and most importantly, the educational opportunity offered by the factual and legal situation.

104. Now, in order to comply with the Rule XX Amendments, QUIGLEY may not permit LLC to use its resources to represent individuals and community organizations whose cases afford the best teaching opportunities because clients now must be selected based on Sections 4, 5, and 10 of the Rule XX Amendments rather than the pedagogic value of the case as determined by QUIGLEY. Therefore, QUIGLEY's freedom to use clinic resources in the manner he deems pedagogically appropriate has been restricted, impermissibly burdening QUIGLEY's academic freedom.

105. Additionally, QUIGLEY's freedom to use clinic resources to associate with clients for the sake of advocating shared beliefs and views has been burdened because the Rule XX Amendments prohibit students from handling any case

in which the client was solicited, and also prevent QUIGLEY from involving students in the representation of clients who fail to meet the income and disclosure requirements in the Rule XX amendments.

106. QUIGLEY is also harmed by Section 4 — requiring individuals to meet a stringent standard establishing their indigency — because its rigidity interferes with his academic freedom and also prevents LLC from representing individuals who are genuinely unable to afford other counsel. While LLC has referred to poverty thresholds and legal service criteria as guidelines to help select cases, as a program in a private university LLC has always had the flexibility to choose to represent for free some people who do not fall into the government categories but who obviously also cannot afford private counsel. LLC has done this because it offers a pedagogical opportunity for clinical teaching and advances the public interest. The Rule XX Amendments are too rigid and inflexible to allow QUIGLEY the freedom to teach his students how to represent people who cannot otherwise afford legal representation in the way he determines is best. The Rule XX Amendments infringe academic freedom and the right to speech and association by imposing an inflexible and inappropriate standard of indigency on representation of individuals by LLC.

107. Section 10 of the Rule XX Amendments violates QUIGLEY's right to free speech and association because it impedes his efforts to initiate contact with individuals and organizations for the purpose of educating them about their legal rights and remedies and informing them about the legal services offered by LLC. Although LLC does not regularly

conduct such client outreach, from time to time, and prior to the enactment of Section 10, QUIGLEY has engaged in client outreach as an effective and important means for obtaining clinical clients and as a vehicle for associating with community groups. Because of the Rule XX Amendments he can no longer offer LLC's legal assistance, thus penalizing QUIGLEY as well as the individual and community organization clients, for engaging in protected First Amendment activity. Section 10 intrudes upon QUIGLEY's right to academic freedom by further limiting his selection of cases and activities for LLC's curriculum, and impairs his First Amendment right of association and speech by chilling him from associating with, and providing legal advice to, individuals and community organizations.

108. Moreover, because the Rule XX Amendments are vague and overbroad, QUIGLEY has been reluctant to determine that any organizational client qualifies for representation. QUIGLEY fears that he, his students, and his staff may be the targets of retaliatory sanctions motions and other claims of professional misconduct — regardless of their good-faith efforts to comply with the new restrictions — because the Rule XX Amendments are so ambiguous and can be construed in different ways.

109. This fear of retaliation by the defense bar has harmed LLC and has further infringed on QUIGLEY's First Amendment rights of expression and association.

Appendix D

Impact on Law Student-Plaintiffs

I. *Plaintiff ELS*

110. The constitutional rights of plaintiff ELS and its members are impaired by the Rule XX Amendments. ELS engages in various activities designed to promote educational opportunities at Tulane Law School and to further environmental protection. For example, ELS has worked together with community groups and assisted them in their efforts to resist pollution and harm to the environment. ELS also promotes environmental education at Tulane, both informally and as part of the curriculum. The Rule XX Amendments have a direct negative impact on the quality of clinical legal education provided by TELC, thereby impairing ELS and its members' academic freedom.

111. As a campus student organization, ELS is harmed because the Rule XX Amendments undermine the academic freedom of members of the Tulane University community. The members of ELS chose to attend Tulane in order to receive a high quality education and to learn from one another and from the Tulane faculty in an atmosphere characterized by the free exchange of ideas. For some, the public service advocacy of TELC was the determining factor in deciding to matriculate at Tulane University Law School. The Rule XX Amendments chill Tulane students and faculty from exercising important First Amendment rights because the rule inhibits students and faculty members from engaging in speech, association, and petitioning of government which certain business and governmental interests find distasteful. The Rule XX Amendments thus represent a direct assault

on the ability of the Tulane University community to learn together and from one another.

112. Members of ELS are deeply interested in the environmental law program at the Tulane University Law School, of which TELC is a central component. The Tulane University Law School's environmental program has earned its reputation as among the most prestigious in the country, and the program's reputation was central to the decision of ELS's members to attend Tulane. Indeed, many second-year law student members of ELS have applied for admission to TELC, and many first-year students will apply for admission to TELC when they are eligible to do so. The Rule XX Amendments have limited the quantity and diversity of clients which TELC can represent, and have prevented TELC from choosing those cases which are most appropriate to the training of TELC student practitioners. As a result, the Rule XX Amendments have, and will continue to have, a negative impact on the quality of the educational experience available to and enjoyed by the members of ELS.

II. *Plaintiff GAPSA*

113. The Rule XX Amendments violate the constitutional rights of GAPSA by restricting the subject matter of their education in a manner that directly harms law students and threatens the academic freedom of all graduate and professional students.

114. The Rule XX Amendments harm members of GAPSA in their post-graduate efforts to obtain employment and in their professional lives. The educational opportunity

provided by TELC is diminished because students can no longer learn about the law by representing community organizations. Upon information and belief, law firms and other potential employers are aware that the Rule XX Amendments have diminished the quality of the legal education offered by TELC and are therefore less likely to hire Tulane graduates. As a direct result of the impairment of their substantive legal education, students' careers have been and will be adversely affected.

III. *Plaintiffs CAUSEY and DELIZIA*

115. The Rule XX Amendments impermissibly restrict the academic freedom of plaintiffs CAUSEY and DELIZIA.

116. CAUSEY and DELIZIA, currently third-year students, decided to attend Tulane University Law School because of the strength of its academic reputation and clinical legal education program in general, and because of the environmental law program and TELC in particular. In their first two years at Tulane, both worked diligently to secure very desirable, limited spots in TELC. In addition to studying hard, earning good grades, and distinguishing themselves as intelligent, analytical, industrious, and ethical law students, CAUSEY and DELIZIA took additional environmental law classes that significantly increased their workload but supplied the necessary foundation to support anticipated participation in TELC. Both met TELC's selective criteria and were accepted to participate in TELC for the academic year 1998-99. CAUSEY and DELIZIA declined other interesting opportunities so that they could participate in TELC.

117. By limiting TELC's ability to represent community organizations, the Rule XX Amendments have impaired CAUSEY and DELIZIA's educational experience and the quality of their legal training. Because TELC has severely reduced its intake of cases as a result of the Rule XX Amendments, neither has been able to work on a case from its genesis, depriving both of a critical aspect of clinical legal training. They have not experienced the rich variety of cases that they and their professors believe is pedagogically sound. In sum, CAUSEY and DELIZIA have not received the educational experience and legal training they would have had the LOUISIANA SUPREME COURT not impermissibly restricted Supreme Court Rule XX.

118. Moreover, both CAUSEY and DELIZIA are concerned that they could be the target of retaliatory sanctions motions, charges of professional misconduct, or even accusations that they have engaged in the unauthorized practice of law by adversaries seeking to exploit the vagueness and overbreadth of the Rule XX Amendments. Both are particularly concerned because any such ethics complaint, no matter how groundless, would have to be reported to the state and federal bars in which they will seek admission. This fear of retaliation by the defense bar has silenced CAUSEY and DELIZIA and further infringed on their rights of free expression and association.

IV. *Plaintiff HANAMAN*

119. HANAMAN, currently a second-year student at Tulane University Law School, has been selected for a position as a student attorney in TELC for the 1999-2000

academic year. Like other successful applicants to TELC, HANAMAN has worked diligently in order to improve her candidacy. In addition to studying hard, earning good grades, and distinguishing herself as an intelligent, analytical, industrious, and ethical law student, HANAMAN has taken environmental law classes and is currently vice-president of ELS. These activities have appreciably increased her workload, but have helped to prepare her for the intensive academic and clinical experience she expects to receive as a student practitioner in TELC. HANAMAN declined other interesting academic opportunities so that she could participate in TELC.

120. The Rule XX Amendments will interfere with HANAMAN's academic freedom rights by severely restricting TELC's client base, case load, and range of cases. As a result of the Rule XX Amendments, HANAMAN will not be able to participate in the rich variety and quantity of cases that TELC would ordinarily offer. Thus, the Rule XX Amendments will impair her educational experience and the quality of her legal training.

121. Moreover, by enrolling in TELC in the 1999-2000 academic year, HANAMAN risks being the target of retaliatory sanctions, charges of professional misconduct, or even accusations that she has engaged in the unauthorized practice of law by adversaries seeking to exploit the vagueness and overbreadth of the Rule XX Amendments. Any such ethics complaint, no matter how groundless, would be reported to the state and federal bars in which she will seek admission after her graduation. This fear of retaliation infringes HANAMAN's First Amendment rights of expression and association.

122. HANAMAN hopes to pursue a career in environmental law after she graduates from law school. The environmental law program at Tulane University Law School is currently one of the most well-regarded programs of its kind in the country, and the program's reputation among employers played a central role in HANAMAN's decision to attend Tulane. By limiting TELC's ability to represent community organizations, however, the Rule XX Amendments will affect HANAMAN's educational experience and the quality of her legal training. Upon information and belief, potential legal employers are aware of the effects of the Rule XX Amendments, and therefore will be less likely to hire Tulane graduates. Thus, the Rule XX Amendments will have a direct adverse effect on HANAMAN's career.

Impact on Donor-Plaintiff

123. The Rule XX Amendments impermissibly interfere with donor-plaintiff SHEARER's rights of free speech and association. SHEARER has contributed, and will continue to contribute, funds to support TELC because he strongly believes in the importance of the education provided by TELC and the value of its work on behalf of individuals and organizations who are unable to afford private counsel. The Rule XX Amendments harm SHEARER by preventing his donations from being used to the full extent he seeks.

124. SHEARER is harmed because the LOUISIANA SUPREME COURT has directed how TELC should spend the money he has donated, even though the LOUISIANA SUPREME COURT lacks sufficient authority to control the

use of private funds. SHEARER believes that TELC, like other entities that mediate between citizens and government, plays an essential role in American society in stabilizing and strengthening democratic government. SHEARER donates to TELC because he believes it effectuates this goal. He is harmed by the Rule XX Amendments because they weaken the capacity of law clinics to perform this vital mediating function that SHEARER seeks to strengthen through his donations.

125. The Rule XX Amendments also violate SHEARER's rights under the First Amendment because they interfere with the efforts of TELC faculty in teaching students. SHEARER has funded TELC because he believes that the faculty will exercise its pedagogic discretion independently by identifying matters for study that promote legal education and democratic values. SHEARER's right to freedom of speech is violated because the Rule XX Amendments prevent TELC faculty from exercising their independent pedagogic judgment about what and how to teach in their classes, and undercut SHEARER's wish that such judgment be exercised to enforce laws and advance the public interest.

Necessity for Relief

126. Unless defendant LOUISIANA SUPREME COURT is preliminarily and permanently enjoined from implementing and enforcing the Rule XX Amendments, plaintiffs will, as set forth above, continue to suffer irreparable and continuing harm and injury through the deprivation of their constitutional rights.

127. The substantial threat of irreparable harm to plaintiffs from the deprivation of their constitutional rights outweighs any negligible damage the relief sought might cause to the LOUISIANA SUPREME COURT.

128. The relief sought by plaintiffs will not disserve the public interest, because the Rule XX Amendments infringe plaintiffs' constitutional rights, and the preservation of such constitutional rights in fact will further the public interest.

129. Plaintiffs have no adequate remedy at law.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

130. The Rule XX Amendments constitute viewpoint discrimination in violation of the First Amendment to the United States Constitution and Article I, Section 7 of the Constitution of the State of Louisiana, because they were intended to, and do, discriminate against the TELC law professor-plaintiffs, student-plaintiffs, their client-plaintiffs, and the donor-plaintiff on the basis of their political views while favoring the views of certain business entities adverse to those plaintiffs.

SECOND CLAIM FOR RELIEF

131. The Rule XX Amendments violate the equal protection clause of the Fourteenth Amendment to the United States Constitution, and Article I, Section 3 of the

Constitution of the State of Louisiana, because they were intended to, and do, discriminate against the TELC law professor-plaintiffs, student-plaintiffs, and their client-plaintiffs on the basis of their political views while favoring the views of certain business entities adverse to those plaintiffs.

THIRD CLAIM FOR RELIEF

132. Section 10 of the Rule XX Amendments, forbidding student-plaintiffs in law school clinics that neither receive state funds nor operate for commercial gain from representing any indigent individual or community group if any clinical supervising lawyer, staff person, or student practitioner initiated any contact or communication with the client for purposes of representing that client, violates the plaintiffs' rights under the First Amendment to the United States Constitution and Article I, Sections 7, 9, and 22 of the Constitution of the State of Louisiana because it infringes the plaintiffs' rights of freedom of speech, freedom of association, and to petition the government for redress of grievances.

FOURTH CLAIM FOR RELIEF

133. Section 4 of the Rule XX Amendments, forbidding law professor-plaintiffs and student-plaintiffs in law school clinics that neither receive state funds nor operate for commercial gain from representing any indigent individual or family unless the client can document that its income is less than the particular indigency standard set by the LOUISIANA SUPREME COURT, violates the rights of the

law professor-plaintiffs and student-plaintiffs under the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 9, and 23 of the Constitution of the State of Louisiana because it improperly infringes upon their academic freedom.

134. Section 5 of the Rule XX Amendments, forbidding law professor-plaintiffs and student-plaintiffs in law clinics that neither receive state funds nor operate for commercial gain from representing any indigent community organization client-plaintiff unless the client can document that at least 51 percent of its members meet the particular indigency standard for individuals set by the LOUISIANA SUPREME COURT, violates the rights of the law professor-plaintiffs and student-plaintiffs under the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 9, and 23 of the Constitution of the State of Louisiana because it improperly infringes upon their academic freedom.

FIFTH CLAIM FOR RELIEF

135. Section 5 of the Rule XX Amendments, compelling any client-plaintiff seeking representation from law professor-plaintiffs and student-plaintiffs in law school clinics that neither receive state funds nor operate for commercial gain to (a) obtain private financial and other information from its members, (b) disclose such information as a condition for obtaining clinical legal representation, and (c) make written certification of the organization's inability to afford private counsel subject to inspection by the LOUISIANA SUPREME COURT, and potentially others,

violates the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 9, and 22 of the Constitution of the State of Louisiana, because Section 5's rigid income guidelines and intrusive income verification procedures pose a substantial risk of suppressing plaintiffs' freedom of speech, freedom of association, and right to petition the government for redress of grievances, and, in fact, improperly burden those rights.

SIXTH CLAIM FOR RELIEF

136. Section 5 of the Rule XX Amendments, compelling any client-plaintiff seeking representation from law professor-plaintiffs and student-plaintiffs in law school clinics that neither receive state funds nor operate for commercial gain to (a) obtain private financial and other information from its members, (b) disclose such information as a condition for obtaining clinical legal representation, and (c) make written certification of the organization's inability to afford private counsel subject to inspection by the LOUISIANA SUPREME COURT violates the rights of the law-professor plaintiffs, student-plaintiffs, and client-plaintiffs under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Constitution of the State of Louisiana, because it provides insufficient guidance on how to comply with Rule XX and is therefore vague and overbroad.

SEVENTH CLAIM FOR RELIEF

137. The Rule XX Amendments violate the donor-plaintiff's rights to freedom of speech and association under

the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 9, and 22 of the Constitution of the State of Louisiana because they improperly interfere with his ability to advance his beliefs by contributing funds to law school clinics.

EIGHTH CLAIM FOR RELIEF

138. The Rule XX Amendments violate the due process clause of the Fourteenth Amendment to the United States Constitution, and Article I, Section 2 of the Constitution of the State of Louisiana, because the process by which the SUPREME COURT OF LOUISIANA adopted the Rule XX Amendments was arbitrary, capricious, biased, and lacking in fundamental fairness; deprived the client-plaintiffs of their protected liberty interests and fundamental constitutional rights without fair notice, explanation of defendant's evidence, or any opportunity to be heard; and deprived the law professor-plaintiffs and student-plaintiffs of their protected liberty interests and fundamental constitutional rights without a fair explanation of defendant's evidence against them or a full and fair opportunity to be heard on that evidence.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court enter judgment in their favor and issue an order:

(1) declaring that the Rule XX Amendments are unconstitutional;

(2) granting preliminary and permanent injunctive relief enjoining defendant from implementing and enforcing the Rule XX Amendments, in whole or in part, against plaintiffs or any other persons or entities;

(3) granting preliminary and permanent injunctive relief enjoining defendant from disciplining plaintiffs or any attorney or student practitioner, including but not limited to disqualification or removal from any case, disbarment, denial of admission to the Bar of the State of Louisiana, or prosecution for the unauthorized practice of law, in connection with a purported violation of the unconstitutional provisions of the Rule XX Amendments, in whole or in part;

(4) granting preliminary and permanent injunctive relief directing defendant to continue in effect the provisions of Rule XX as they existed prior to the amendments in 1998 and 1999 and enjoining defendant from adopting unconstitutional student practice rules in the future;

(5) awarding plaintiffs their costs and disbursements associated with the filing and maintenance of this action, including an award of reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and

(6) awarding such other equitable and further relief as the Court deems just and proper.

Appendix D

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Date: NEW ORLEANS, LOUISIANA
April 16, 1999

(2)

No. 01-360

Supreme Court, U.S.
FILED
SEP 26 2001
OFFICE OF THE CLERK

In The

Supreme Court of the United States

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, LOUISIANA CHAPTER; ST. JAMES CITIZENS FOR JOBS AND THE ENVIRONMENT; CALCASIEU LEAGUE FOR ENVIRONMENTAL ACTION NOW; HOLY CROSS NEIGHBORHOOD ASSOCIATION; FISHERMEN'S AND CONCERNED CITIZENS' ASSOCIATION OF PLAQUEMINES PARISH; ST. THOMAS RESIDENTS COUNCIL; LOUISIANA ENVIRONMENTAL ACTION NETWORK; LOUISIANA COMMUNITIES UNITED; LOUISIANA ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW; NORTH BATON ROUGE ENVIRONMENTAL ASSOCIATION; ROBERT KUEHN; CHRISTOPHER GOBERT; ELIZABETH E. TEEL; JANE JOHNSON; WILLIAM P. QUIGLEY; TULANE ENVIRONMENTAL LAW SOCIETY; TULANE UNIVERSITY GRADUATE AND PROFESSIONAL STUDENT ASSOCIATION; INGA HAAGENSON CAUSEY, CAROLYN DELIZIA, AND DANA HANAMAN,

Petitioners,

v.

THE SUPREME COURT OF THE STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S OPPOSITION

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2 cp

QUESTION PRESENTED

1. Did the district court properly dismiss the Petitioners' suit for failure to state a claim when:

A. The Louisiana Supreme Court rule about which Petitioners complain contains no restriction on the right of any attorney to solicit and represent public interest *pro bono* clients;

B. The Louisiana Supreme Court rule about which Petitioners complain does not prohibit students from informing individuals or organizations about their legal rights or from acting as law clerks in cases handled by licensed attorneys;

C. The Louisiana Supreme Court rule about which Petitioners complain does not prohibit organizations from informing their members about their legal rights or from referring their members to licensed attorneys;

D. There is no right of non-lawyers to represent third parties in court, and no individual or organization has a right to an attorney in a civil case;

E. The Louisiana Supreme Court rule about which Petitioners complain contains no restriction on the right of any licensed attorney to practice law; and

F. The Louisiana Supreme Court rule about which Petitioners complain contains no restriction on any licensed attorney's representation of any clients.

PARTIES TO THE PROCEEDING

Parties Plaintiff:

Southern Christian Leadership Conference, Louisiana Chapter
St. James Citizens for Jobs and the Environment
Calcasieu League for Environmental Action Now
Holy Cross Neighborhood Association
Fishermen's and Concerned Citizens' Association of Plaquemines Parish
St. Thomas Residents Council
Louisiana Environmental Action Network
Louisiana Association of Community Organizations for Reform Now
North Baton Rouge Environmental Association
Louisiana Communities United
Robert Kuehn
Christopher Gobert
Elizabeth E. Teel
Jane Johnson
William P. Quigley
Tulane Environmental Law Society
Tulane University Graduate and Professional Student Association
Inga Haagenson Causey
Carolyn Delizia
Dana Hanaman

Parties Plaintiff below Who Did Not Join in this Petition:

C. Russell H. Shearer

Amicus:
Amicus in the District Court:

Louisiana Appleseed
Clinical Legal Education Association

PARTIES TO THE PROCEEDING – continued

Amicus in the Fifth Circuit:

Association of American Law Schools
American Association of University Professors
Clinical Legal Education Association
American Civil Liberties Union of Louisiana
League of Women Voters of Louisiana
Louisiana Appleseed
Gloria Roberts
James M. Klebba, Dean of Loyola University School of Law
Edward F. Sherman, Dean of Tulane Law School

Defendant:

The Supreme Court of the State of Louisiana

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STATEMENT OF THE CASE

PROCEEDINGS BELOW

The Petitioners filed this action in the United States District Court for the Eastern District of Louisiana. There was one additional party who neither joined in the appeal to the United States Fifth Circuit Court nor sought relief in this Petition.[1]

The Louisiana Supreme Court filed a motion to dismiss the complaint for failure to state a claim as to which relief can be granted. After a hearing, with extensive briefing and oral argument, the district court granted the motion to dismiss on July 29, 1999. *Southern Christian Leadership Conference v. Supreme Court of Louisiana* ("*SCLC*"), 61 F.Supp.2d 499 (E.D. La. 1999). (Petition for Writ of Certiorari, Appendix B.)[2]

On May 29, 2001, the United States Fifth Circuit Court of Appeals affirmed the dismissal. *SCLC*, 252 F.3d 781 (5th Cir. 2001), (App. B).

STATEMENT OF FACTS

The "facts" considered on a motion to dismiss are the allegations in the complaint.[3] While there is a substantial

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[1] C. Russell H. Shearer, a Plaintiff below, did not join in the appeal to the Fifth Circuit. In the Complaint, R. 164, he is listed as a party, but in the Petitioners' Original Fifth Circuit brief he no longer appears as a party.

[2] The Appendix attached to the Petition ("Pet.") will be referred to as "App."

[3] *Kossick v. United Fruit Co.*, 365 U.S. 731, 732 (1961).

dispute as to the accuracy of these allegations, at this point in the case the only thing pertinent is the complaint's allegations and whether they state a claim. The legal issues in the Petitioners' application flow from the following allegations.

The Petitioners are composed of four separate groups; each asserted various causes of actions in the district court. The groups are:

- *Client Organizations,* nine different organizations and one organization composed of twenty separate groups;[4]
- Five *Law Professors* and clinical law instructors from two different Louisiana law schools (Complaint ¶15, App. D, p. 85a);
- Three *Law Students* (Complaint ¶16, App. D, p. 87a); and
- Two *Student Organizations Which Do Not Represent Litigants In Court* (Complaint ¶16(a)-(b), App. D, p. 88a).

Noticeably absent as a party is the Tulane Environmental Law Clinic, the organization that Petitioners alleged was the object of the changes to Rule XX. Also noticeably absent as a party is any law clinic program associated with any of the other law schools in Louisiana.

Each of the groups of Petitioners alleged separate causes of action in the district court. In addition, all

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[4] Louisiana Communities United is described as a "coalition of 20 community, church and union groups in the Mississippi River Parishes of Ascension, Iberville, St. James, East Baton Rouge, and St. Charles." Complaint ¶ 13(j); App. D, p. 85a.

Petitioners made broad-ranging claims that the amendments to Rule XX amounted to "viewpoint discrimination" and discrimination based upon political views (Complaint ¶130, 131; App. D, p. 134a).

The essence of the complaint is that the Tulane Environmental Law Clinic had interpreted the former version of Louisiana Supreme Court Rule XX (governing when law students may appear as counsel in civil cases) as permitting its non-lawyer students to represent organizations of any type in any legal proceeding. The complaint assumes that the Tulane Environmental Law Clinic's reading of the former rule is the correct one and alleges that, in light of that Clinic's success in certain litigation, the Louisiana Supreme Court altered the rule under political pressure.

A number of the Petitioners' claims were abandoned in the appeal to the Fifth Circuit,[5] and in this Petition the claims at issue have been limited further.[6]

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[5] Abandoned in the Fifth Circuit were claims concerning: 42 U.S.C. § 1983 and 1988; claims concerning the right to petition the government for redress of grievances; claims of a denial of equal protection and due process; all claims of vagueness and overbreadth; all claims under the Louisiana State Constitution; and all claims of Plaintiffs C. Russell H. Shearer, Tulane Environmental Law Society and Tulane Graduate and Professional Student Association. An issue not briefed on appeal is considered abandoned. *United States v. Gipson*, 46 F.3d 472, 475 (5th Cir. 1995); *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir.), *cert. denied*, 513 U.S. 868 (1994); *Hobbs v. Blackburn*, 752 F.2d 1079, 1083 (5th Cir.), *cert. denied*, 474 U.S. 838 (1985).

[6] The academic freedom claim appears to be limited solely to the anti-solicitation claim (Petitioners' fifth question presented).

The complaint does not allege that the Louisiana Supreme Court lacks the right to promulgate a rule controlling the actions of non-lawyers who seek to serve in a representative capacity in litigation; rather, it is the Petitioners' position that once a rule is established, it cannot be altered without triggering a constitutional inquiry (Petitioners' Fifth Circuit Brief at p. 26). The Petitioners conceded in the Fifth Circuit (Petitioners' Fifth Circuit Brief at pp. 21, 37) that, without a rule, no student could represent others in litigation.

ARGUMENT

The petition for a writ of certiorari should be denied because it raises questions not passed upon by either the District Court or the Fifth Circuit Court of Appeals. In addition, the questions presented by the Petitioners do not meet the usual and customary requirements for granting a writ of certiorari, because Petitioners' questions do not present (1) a conflict between United States courts of appeals, or (2) a conflict between a United States court of appeals and a state court of last resort or between two state courts of last resort, or (3) an important question of federal law upon which the Supreme Court should, but has not, ruled.

I. The facts of the case militate against the granting of the writ.

There are five factors, clear from the record and the Fifth Circuit's opinion, that militate against the granting of the writ.

First, nothing in the Louisiana Supreme Court's Rule XX affects in any way the right of licensed attorneys to represent anyone – individual, association, corporation, or otherwise – in any matter in any court. Rather, the rule solely impacts non-lawyers who seek to represent others before tribunals.[7] Petitioners' contentions that amended Rule XX somehow inhibits community outreach (Pet. pp. 26-27) overlooks the fact that nothing in the rule prohibits any licensed lawyer, whether or not associated with a law school clinic, from representing any person or entity or providing outreach or information.

Second, Petitioners concede that there is no right for non-lawyers to represent others in court,[8] and the law is clear that while individuals may appear *pro se*,[9] corporations, organizations, and business entities may not.[10] Further, it is undisputed that there is no right for Petitioners to either demand or be provided counsel in civil cases.[11]

Third, it is telling that although Petitioners contend that the purported reason for the change in Rule XX was

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[7] The official Louisiana Supreme Court Commentary to Rule XX explicitly states it "places no restrictions on the pro bono representation of solicited clients *by attorneys* employed by or retained by law schools or law clinics." Commentary following Rule XX Section 10, emphasis supplied.

[8] *See* Pet. p. 2; *SCLC*, 61 F.Supp.2d at 506.

[9] 28 U.S.C. § 1654; *Andrews v. Bechtel Power Corp.*, 780 F.2d 124 (1st Cir. 1985), *cert. denied*, 476 U.S. 1172 (1986).

[10] *Pecarsky v. Galaxiworld.com Ltd.*, 249 F.3d 167 (2d Cir. 2001). Louisiana law explicitly states that only lawyers may represent third parties in court. LA. REV. STAT. ANN. § 37:213.

[11] *See* the cases cited and discussed in the district court's opinion, *SCLC*, 61 F.Supp.2d at 506-07.

to affect the Tulane Environmental Law Clinic,[12] the Clinic is not a party to this case.

Fourth, although the Fifth Circuit discussed the standing issue, it engaged in no specific analysis of each set of plaintiffs' claims and merely concluded that "at least some of the Plaintiffs have standing to bring each type of claim."[13] Thus, the particularized requirements of standing for each of the four plaintiff groups have never been specifically addressed and that matter would have to be resolved by this Court, for standing is jurisdictional.[14]

Finally, as the Fifth Circuit noted, the Louisiana Supreme Court has not asserted its Eleventh Amendment Immunity below,[15] but it still has the right to claim this defense.[16]

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[12] *See* Pet. pp. 4-6; *SCLC*, 252 F.3d at 794 (5th Cir. 2001).

[13] *SCLC*, 252 F.3d at 789 (5th Cir. 2001).

[14] Standing requirements are both jurisdictional and not subject to waiver. *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996). The issue may be raised on appeal even though lack of standing was not the basis of the dismissal below. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 540-41 (1986).

[15] *SCLC*, 252 F.3d at 783 n.2 (5th Cir. 2001).

[16] "The fact that the State appeared and offered defenses on the merits does not foreclose consideration of the Eleventh Amendment issue; 'the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar' that it may be raised at any point of the proceedings." *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.18 (1982); *Edelman v. Jordan*, 415 U.S. 651, 678 (1974).

II. The questions presented were not raised in the courts below.

The Petitioners' assertions that the "Court should clarify the circumstances under which courts are to consider viewpoint suppressive motive" (Pet. p. 9) and that the "Court should clarify how the First Amendment unconstitutional conditions doctrine applies" (Pet. p. 19) were not raised in either the district or appellate court. "[O]rdinarily, this Court does not decide questions not raised or resolved in the lower courts." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992), quoting with approval from *Youakim v. Miller*, 425 U.S. 231, 231 (1976).

Although the Court in exceptional circumstances may consider issues not raised in the lower courts, this is not an exceptional situation. The case deals not with the broad range of free speech issues but with the narrow question of a court rule regulating non-lawyers who seek to represent others. The petition for a writ of certiorari should be denied because the Petitioners did not raise in the courts below the issues they now ask this court to address.

III. The petition does not meet the normal criteria for granting a writ of certiorari.

United States Supreme Court Rule 10 provides that the granting of a petition for a writ of certiorari is a matter of judicial discretion and will be exercised only for compelling reasons. Compelling reasons, under the Rule, consist of (1) a conflict between two circuit courts; or (2) a conflict between two state courts of last resort or between

one such court and a United States court of appeal; or (3) an important question of federal law that has not been, "but should be, settled by this Court." None of these criteria are present here.

A. Petitioners do not identify a conflict between this ruling and any other case.

Petitioners do not identify a single ruling in a single case that conflicts with the Fifth Circuit's ruling. They do not assert that any other case has held that students have a right to represent others in civil proceedings.[17]

1. Alleged differences in this Court's rulings on "motive" analysis under different portions of the First Amendment do not provide a basis to grant a writ of certiorari in this case.

Rather than pointing to any opinions that directly conflict with the Fifth Circuit's ruling below, the Petitioners claim that this Court's holdings "do not yield clear-cut guidance" (Pet. p. 19) and have "given conflicting signals" (Pet. p. 9) about when motive is to be considered in First Amendment cases. To try to create an issue for their writ, the Petitioners expand their specific claims about the purported infringement of the rights of

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[17] Earlier this year, this Court decided *Shaw v. Murphy*, 532 U.S. 223, 121 S.Ct. 1475 (2001). While *Shaw* concerned whether a prisoner had the right to represent another prisoner, and while a prisoner's constitutional rights are more limited than society at large, this Court noted there was "no free standing right" to give or receive legal advice. 121 S.Ct. at 1480 n.3.

teachers to teach through using students as lawyers, the purported rights of organizations to perform "outreach" culminating in court representation by non-lawyers, and the purported infringement of the rights of non-lawyers to solicit clients that the non-lawyers could represent in court, into a generalized First Amendment claim. Once this metamorphosis is complete, Petitioners then compare their generalized claim to ones concerning the Free Exercise Clause (*Church of the Lukumi Babula Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993)), the Establishment Clause (*Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000); *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987)), and Freedom of the Press (*Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 579-80 (1983); *Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 250 (1936)).

It goes without saying that all First Amendment claims are not subject to either the same analysis or the same jurisprudence. Petitioners admit as much when they state that the "Court has reached different conclusions about the role of motive in its analysis of First Amendment claims depending on the particular circumstances presented" (Pet. p. 14). Of course, each case is decided upon its facts, but that adds nothing to the Petitioners' position. What Petitioners overlook is that an allegation of a violation of a specific clause of the First Amendment is interpreted pursuant to the jurisprudence concerning that clause.

Petitioners' claims against the Louisiana Supreme Court have nothing to do with the establishment clause; therefore, Petitioners' reference to this Court's analysis in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), and its

discussion of "purpose"[18] has no relevance to the issues in the instant case. Likewise, whether the Court looked to motive in deciding other establishment clause cases such as *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000), or *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) is irrelevant here. Neither case concerned viewpoint discrimination nor was decided upon free speech grounds.

The Petitioners' discussion of *Church of the Lukumi Babula Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993), which concerned the free exercise of religion, not free speech,[19] avails them nothing, for the instant case does not deal with religion.

The Petitioners' position is not augmented by their reliance on two cases striking down special taxes on the press: *Minneapolis Star*[20] and *Grosjean*.[21] The instant case has nothing to do with freedom of the press. Morever, *Minneapolis Star* discussed *Grosjean*, pointed out that "our

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[18] "The Court has applied a three-pronged test to determine whether legislation comports with the Establishment Clause. First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion." *Aguillard*, 482 U.S. at 582-83.

[19] It also should be noted that the Petitioners' reliance on *Church of Lukumi Babalu Aye* is undermined by its reference not to the Court's holding but rather to a statement in a concurring opinion. Pet. p. 13.

[20] *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

[21] *Grosjean v. American Press Co., Inc.*, 297 U.S. 233 (1936).

subsequent cases have not been consistent in their reading of *Grosjean*," and held that the issue before it could not be resolved by reliance upon *Grosjean* but rather must be analyzed "anew." 460 U.S. at 580. *Minneapolis Star's* concluding paragraph undermines any claim that motive was the key to its holding: "We need not and do not impugn the motives of the Minnesota legislature in passing the ink and paper tax. Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." 460 U.S. at 592.

Petitioners' citation of *Board of Education v. Pico*, 457 U.S. 853 (1982) to support their position that "this Court has not articulated a standard for when motive inquiry is appropriate" (Pet. p. 10) has no relevance here. *Pico* concerned the removal of books from a school library – a denial of "the right to receive ideas." 457 U.S. at 867. As the next section of this brief demonstrates, the rule at issue here does not deny access to any idea in any manner.

The jurisprudence is clear; each type of claim under differing clauses of the First Amendment is subject to its own analysis. "It would be error to conclude, however, that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 660 (1994). In this case, involving non-lawyers who seek to represent others in court, Petitioners' attempt to create a generalized conflict in "motive" analysis, a point not raised below, does not create a basis for granting a writ of certiorari.

2. Rule XX does not prohibit outreach or informational efforts, and Petitioners' reliance on cases involving the rights of licensed lawyers is misplaced.

Petitioners' reliance on *NAACP v. Button*, 371 U.S. 415 (1963) and *In re Primus*, 436 U.S. 412 (1978) is misplaced. *Button* involved regulation of the practice of law by lawyers. This Court held that the solicitation ban on lawyers and organizations could not be constitutionally applied; the direct harm was to attorneys and those who referred organizations and members to attorneys. *Primus* involved a lawyer who had received a private reprimand for advising an organization's members of their legal rights. Neither case contains the slightest intimation that its holdings relate to non-lawyers who seek to represent others in court.

There is nothing in either *Button* or *Primus* that is inconsistent with Rule XX or the Fifth Circuit's holding. Nothing in Rule XX prevents the client organizations from informing their members about the law. Nothing in Rule XX prohibits any *licensed lawyer* from handling any case before or after an organization or its members have been informed of their rights, whether by the organization or by students. As the Fifth Circuit held, "Rule XX does not prevent the clinics or their members from engaging in outreach, or even from contacting particular clients, advising them of their rights, and offering and then proceeding to represent those clients. The rule only prohibits the non-lawyer student members of the clinics from representing *as attorneys* any party the clinic has so solicited." *SCLC*, 252 F.3d at 789.

There is no "solicitation" or speech issue here that is appropriate for review.

B. There is no issue of great importance here that would justify granting the writ of certiorari.

Petitioners do not assert that the questions here are of great importance; rather, Petitioners contend that the Court "should clarify the circumstances under which courts must consider viewpoint suppressive motive" and that this Court "has not articulated a standard when motive inquiry is appropriate."

The four groups of Petitioners' ultimate claim here is that their purported "rights" can be vindicated only by allowing non-lawyers to represent others in a court of law. Under their theory, only by permitting students to handle litigation for organizations can the alleged First Amendment issues be resolved, even though the Rule at issue contains no prohibition whatsoever on licensed attorneys handling litigation. Petitioners' issue is not one of great importance, and Petitioners' focus on a single line in the Fifth Circuit's opinion – that the "jurisprudence" is "less than clear" (252 F.3d at 792) – does not create a compelling reason for the Court to grant a writ of certiorari, particularly when there is no circuit split or split between federal and state courts.

CONCLUSION

The petition for writ of certiorari should be denied because: (1) the issues concerning the clarity of the Supreme Court's jurisprudence were not raised in the lower courts; and (2) because the Petitioners do not meet any of the usual and customary criteria for a writ of certiorari.

Respectfully submitted,

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